88-70 (2)

No.

In the Supreme Court of the United States

October Term, 1988

JOHN DEKLEWA, THEODORE DEKLEWA and ROBERT DEKLEWA, d/b/a/ JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' APPENDIX

CHARLES R. VOLK
Counsel of Record
JOHN A. MCCREARY, JR.
VOLK, FRANKOVITCH, ANETAKIS, RECHT, ROBERTSON & HELLERSTEDT
Three Gateway Center
15th Floor East
Pittsburgh, PA 15222
(412) 392-2300
Counsel for Petitioners

TABLE OF CONTENTS

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION SIX

JOHN DEKLEWA, THEODORE DEKLEWA AND ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.	**Case 6-CA-16819**
and	
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 3, AFL-CIO	

STIPULATION OF FACTS AND JOINT MOTION TO TRANSFER PROCEEDING DIRECTLY TO THE BOARD

COMES NOW John Deklewa, Theodore Deklewa and Robert Deklewa d/b/a John Deklewa & Sons (herein called Respondent Deklewa & Sons) and/or John Deklewa & Sons, Inc., (herein called Respondent Deklewa, Inc.,) International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO, (herein called the Union,) and Counsel for the General Counsel, being all the parties to this proceeding, and hereby enter into this Stipulation of Facts and jointly petition the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor

Relations Board, Series 8, as amended, and to transfer this proceeding to the Board.

1. The parties agree that the charges, Complaint and Notice of Hearing, Answer to Complaint, and this "Stipulation of Facts" with attached exhibits, constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of a decision by an Administrative Law Judge. The parties also stipulate and agree that they desire to submit this case directly to the Board for findings of fact, conclusions of law, and a decision and order. In the event the Board grants this joint petition, the parties request that the Board set a time for the filing of briefs.

2. Upon a charge filed by the Union on October 14, 1983, receipt of which is hereby acknowledged by Respondent Deklewa & Sons and Respondent Deklewa, Inc. and upon an amended charge filed by the Union on November 22, 1983, receipt of which is hereby acknowledged by Respondent Deklewa & Sons and Respondent Deklewa, Inc., the General Counsel of the National Labor Relations Board (herein called the Board), by the Regional Director for Region Six, acting pursuant to authority granted in Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C., Section 151, et seq., (herein called the Act), and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, issued a Complaint against Respondent Deklewa & Sons and Respondent Deklewa, Inc. on November 28, 1983, together with a Notice of Hearing thereon. True copies of the aforesaid Complaint and Notice of Hearing were duly served by certified mail

upon Respondent Deklewa & Sons and Respondent Deklewa, Inc. and the Union on November 8, 1983. An Answer to the aforesaid Complaint was duly served on the Regional Director for Region Six and the Union's designated representative on December 6, 1983. Upon a second amended charge filed by the Union on March 8, 1984, receipt of which is hereby acknowledged by Respondent Deklewa & Sons and Respondent Deklewa, Inc., an Amendment to Complaint issued against Respondent Deklewa & Sons and Respondent Deklewa, Inc. True copies of the aforesaid Amendment to Complaint were duly served by certified mail upon Respondent Deklewa & Sons and Respondent Deklewa, Inc. and the Union on March 9, 1984. [Exhibits identified here have not been included in this Appendix].

3. (a) At all times material herein, Respondent Deklewa, Inc., a Pennsylvania corporation, with an office and place of business at 1273 Washington Pike, P.O. Box 158, Bridgeville, Pennsylvania, has been engaged in the business of heavy construction, and, in this regard, Respondent Deklewa, Inc. has been, and is party to, collective-bargaining agreements with labor organizations other than the Union, including the Heavy Engineering, Railroad Contracting, Heavy Construction and Utilities Construction Agreement with the Laborers' District Council of Western Pennsylvania.

(b) At all times material herein, Respondent Deklewa & Sons, a partnership, with an office and place of business located at 1273 Washington Pike, P.O. Box 158, Bridgeville, Pennsylvania, has been engaged in the business of construction of commercial and industrial buildings and has been in signed agreement with various labor

organizations which represents various crafts involved in building construction.

(c) During the 12-month period ending October 31, 1983, Respondent Deklewa, Inc., in the course and conduct of its business operations described above in paragraph 2(a), purchased and received at its Bridgeville, Pennsylvania, facility, products, goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

(d) During the 12-month period ending October 31, 1983, Respondent Deklewa & Sons, in the course and conduct of its business operations described above in paragraph 2(b), purchased and received at its Bridgeville, Pennsylvania, facility, products, goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

4. (a) At all times material herein, Respondent Deklewa, Inc. and Respondent Deklewa & Sons have been affiliated business enterprises with interrelated officers, ownership, directors, management and supervision, have jointly formulated and administered labor policy affecting employees of said operations, have shared common premises and facilities, have provided services for, and made sales to, each other, have interchanged personnel with each other and have held themselves out to the public as a single integrated business enterprise. The above single integrated business enterprise was not established as, and does not constitute, a "double-breasted" operation. Respondent Deklewa, Inc. was established in 1983 for financial purposes and not to avoid any collective-bargaining obligation. However, Respondent Deklewa, Inc. at all times material herein has engaged only in heavy construction

while Respondent Deklewa & Sons has engaged only in building construction.

(b) By virtue of the operations described above in subparagraph 4(a), Respondent Deklewa, Inc. and Respondent Deklewa & Sons, herein collectively called Respondent, are now, and have been at all times material herein, a single employer within the meaning of the Act.

5. (a) Respondent Deklewa, Inc. is now, and has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(b) Respondent Deklewa & Sons is now, and has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. The Charging Party is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. At all times material herein, the following named persons occupied the positions set forth opposite their respective names and are now, and have been at all times material herein, supervisors of respective Respondents, as well as Respondent within the meaning of Section 2(11) of the Act and agents of respective Respondents, as well as Respondent within the meaning of Section 2(13) of the Act.

John Deklewa —President Respondent Deklewa, Inc. and Partner, Deklewa & Sons

Theodore Deklewa—Vice President and Treasurer, Respondent Deklewa, Inc. and Partner, Deklewa & Sons

Robert Deklewa —Vice President and Secretary, Respondent Deklewa, Inc. and Partner, Deklewa & Sons

8. The Iron Workers Employer Association of Western Pennsylvania, Inc., herein called the Association, has been an organization composed of employers engaged in the construction industry, and which exists for the Purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with the International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 3, AFL-CIO.

9. The Association and the Union have been parties to successive collective-bargaining agreements, referred to as the Iron Workers Agreement, for at least the past 30 years, the most recent of which is effective June 1, 1982 through May 31, 1985, for all employees in the classifications described in Section 2 of said Agreement. The current Iron Worker Agreement is attached hereto as Exhibit 2. [No Exhibits have been included in this Appendix].

10. A copy of the current by-laws of the Association is attached hereto as Exhibit 3.

11. The membership roster of the Association as of March 1983, is attached hereto as Exhibit 4.

12. On June 24, 1960, Respondent John Deklewa & Sons entered into a pre-hire agreement with the Union, wherein the Respondent agreed to be bound by the provisions of the Iron Worker Agreement. A copy of the above-described pre-hire agreement is attached hereto as Exhibit 5.

13. During the period June 24, 1960, through October 1, 1980, Respondent Deklewa & Sons, as a separate entity and not by virtue of any membership in the Association, executed the successive Iron Worker Agreements including the Agreement effective June 1, 1979 through May 31, 1982, and with respect to those construction projects wherein it directly employed employees in classifications described in the respective Iron Worker Agreement, relied exclusively upon the auspices of the Union's hiring hall as the sole source of its workforce and which workforce was comprised of actual members of the Union as their chosen collective bargaining representative. On the projects in question during the aforementioned period the Respondent Deklewa & Sons adhered to the terms of the then current Iron Worker Agreement, including inter alia, paying the union wage scale to its iron worker unit employees and making contributions to the various benefit funds as required by the labor agreements. An analysis of appropriate records reveal that during this period, Respondent did not regularly move its iron worker unit employees from job to job, and that a majority of said employees were hired on a jobsite-to-jobsite basis. On many of the projects engaged in by Respondent during this period, Respondent did not directly hire iron workers but used subcontractors signatory to the Iron Worker Agreement.

14. On June 1, 1980, Respondent Deklewa & Sons filed an application for membership in the Association,

which application was shortly thereafter, upon action by the Association's Board of Directors, accepted by the Association. A copy of the aforementioned Application for Membership is attached hereto as Exhibit 6.

15. On January 16, 1981, Respondent Deklewa & Sons executed the Association's Designation of Bargaining Agent Agreement, a copy of which is attached hereto as Exhibit 7.

16. During the period June 1, 1980, through May 31, 1982, Respondent Deklewa & Sons continued, with respect to those construction projects wherein it directly employed employees in the classification described in the 1979-1982 Iron Workers Agreement, to rely upon the auspices of the Union's hiring hall as the source of its workforce and which workforce was comprised of actual members of the Union or employees who voluntarily adopted the Union as their chosen collective-bargaining representative. An analysis of appropriate records reveals that a majority of said employees were employed on a jobsite-to-jobsite basis but that on each jobsite the Union was the majority representative of Respondent's iron worker unit employees.

17. Pursuant to Respondent John Deklewa & Son's Designation of Bargaining Agent Agreement, the Association negotiated the 1982-1985 Iron Worker Agreement on behalf of Respondent and other members of the Association, and by virtue of its membership in the Association, Respondent agreed to be bound to the terms of the 1982-1985 Iron Worker Agreement. Respondent executed the 1982-1985 Iron Worker Agreement.

18. In the course of bargaining for the 1982-1985 Iron Worker Agreement, the Association notified the Union of the members, including Respondent to be bound by the

exclusively referred to the jobsite under the auspices of the Union's hiring hall and all employees employed in the classification were members of the Union. An analysis of the records reveal that out of the total number of iron worker unit emplyees directly employed in the above projects there was no continuity of workforce from job to job on a regular basis involving a numerical majority of employees engaged in unit work as set forth in Section 2 of the Iron Workers Agreement. The U.S. Air Project, which was completed in April, 1983, was the last project in which Respondent directly employed employees in the classification of the Iron Workers Agreement.

21. On September 21, 1983, Respondent in writing, advised the Association that it resigned its membership in the Association. Said resignation was made pursuant to Section 11(a) of the Association's By-laws and was made 90 days prior to either (1) the date of notice of renewal, modification, termination or change of any collective-bargaining agreement to which the member is bound, or (2) the date agreed upon between the Association and any labor organization for commencement of multi-employer collective-bargaining negotiations for the renewal, modification, termination, or change of any such agreement to which the member is bound. On the date Respondent advised the Association of its resignation, Respondent had no outstanding dues, assessments or other monetary obligations to the Association. The Association has not opposed Respondent's resignation from the Association but the Association considers Respondent bound to the terms of the 1982-1985 Iron Worker Agreement.

22. By letter dated September 21, 1983, a copy of which is attached hereto as Exhibit 8, Respondent notified

the Union that it was repudiating the Iron Workers Agreement (Exhibit 2) and withdrawing recognition from the Union.

23. On September 21, 1983, Respondent was not engaged in any construction projects wherein it directly employed employees in classifications set forth in Section 2 of the 1982-1985 Iron Workers Agreement, and since that date, Respondent has not engaged in any construction projects wherein it has directly employed employees in the classifications set forth in Section 2 of the 1982-1985 Iron Workers Agreement.

24. By letter dated September 27, 1983, a copy of which is attached hereto as Exhibit 9, the Union advised Respondent that it objected to Respondent's resignation from the Association as the basis for its repudiation of the 1982-1985 Iron Workers Agreement and its withdrawal of recognition from the Union. By letter dated October 4, 1983, a copy of which is attached hereto as Exhibit 10, Respondent reaffirmed its position that it was free to repudiate the 1982-1985 Iron Workers Agreement.

25. On September 30, 1983, the Union filed a grievance with the Association, Grievance No. U108327C, alleging that Respondent violated Section 47—Subcontracting—of the 1982-1985 Iron Workers Agreement with respect to Respondent's project known as the Chippewa Township Water and Sewage Treatment Authority job which was started September 7, 1983, and was completed on December 14, 1983. With respect to this job, Respondent did not directly employ any employees in the classifications set forth in Section 2 of the 1982-1985 Iron Workers Agreement but rather subcontracted this work of tieing reinforcing rods to another employer, who was in signed agreement with the Laborers Union for that type of work.

By letter dated October 3, 1983, a copy of which is attached hereto as Exhibit 11, the Association advised Respondent of the filing of the grievance by the Union and of what it believed was Respondent's obligations pursuant to the relevant grievance arbitration procedures of the Iron Workers Agreement. To date, Respondent by virtue of resignation from the Association and its repudiation of the 1982-1985 Iron Workers Agreement, has taken the position that the dispute is not arbitrable. Further action on the grievance has been held in abeyance pending the outcome of this case.

26. This Stipulation of Facts is made without prejudice to any objection that any party may have as to the materiality or relevancy of any facts stated herein.

Signed at PITTSBURGH, PA
Date APRIL 25, 1984

JOHN DEKLEWA, SR. AND JOHN DEKLEWA, JR., d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.

By CHARLES R. VOLK, attorney
(Name and Title)

1 RIVERFRONT CENTER
(Street)

PITTSBURGH, PA 15222
(City and State)

Signed at PITTSBURGH, PA
Date APRIL 30, 1984

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 3, AFL-CIO

By STANFORD A. SEGAL, ESQ.
(Name and Title)

1708 LAW & FINANCE BLDG.
(Street)

PITTSBURGH, PA 15219
(City and State)

Signed at PITTSBURGH, PA

ROBERT L. FLINT, JR.

Counsel for the General Counsel
National Labor Relations Board, Region Six
1501 William S. Moorhead Federal Building
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222

Date APRIL 30, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3121

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 3,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a John Deklewa & Sons and/or John Deklewa & Sons, Inc.,

Intervenors

No. 87-3192

JOHN DEKLEWA, THEODORE DEKLEWA and ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL 3,

Intervenor

No. 87-3231

JOHN DEKLEWA, THEODORE DEKLEWA and ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.,

Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Petitioner

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 3,

Intervenor

On Petition for Review from
National Labor Relations Board
Board Nos. 6-CA-16819 and 6-CA-16819(1)

Argued Wednesday October 21, 1987

BEFORE: HIGGINBOTHAM, SCIRICA and GARTH, *Circuit Judges*

(Opinion filed April 12, 1988)

STANFORD A. SEGAL
GATZ, COHEN, SEGAL & KOERNER, P.A.
1708 Law & Finance Building
Pittsburgh, Pennsylvania 15219

LAURENCE COHEN
ROBERT KURNICK
SHERMAN, DUNN, COHEN,
LIEFER & COUNTS, P.C.
1125 15th Street, N.W., Suite 801
Washington, D.C. 20005

LAURENCE GOLD (ARGUED)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

VICTOR VAN BOURG
VAN BOURG, WEINBERG, ROGER &
ROSENFIELD
875 Battery Street - Third Floor
San Francisco, California 94111

*Attorneys for Appellant/Petitioner
Local 3, International Association of
Bridge, Structural and Ornamental
Iron Workers*

CHARLES R. VOLK (ARGUED)
JOHN A. MCCREARY, JR.
VOLK, FRANKOVITCH, ANETAKIS,
RECHT ROBERTSON & HELLERSTEDT
Three Gateway Center
15th Floor East
Pittsburgh, Pennsylvania 15222

*Attorneys for Appellant/Petitioner
John Deklewa & Sons, et al.*

ROSEMARY M. COLLYER,
General Counsel
JOHN E. HIGGINS, JR.,
Deputy General Counsel
ROBERT E. ALLEN,
Associate General Counsel
ELLIOTT MOORE,
Deputy Associate General Counsel
JOHN H. FERGUSON,
Deputy Assistant General Counsel
LINDA DREEBEN,
Supervisory Attorney
PATRICK J. SZYMANSKI (Argued)
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Attorney for Appellee/Respondent
National Labor Relations Board

CHARLES E. MURPHY
PHILIP A. MISCIMARRA
RONALD TURNER
MURPHY, SMITH & POLK
Two First National Plaza
Twenty-Fourth Floor
Chicago, Illinois 60603

Attorneys for Amicus Curiae
Associated General Contractors of America

GERARD C. SMETANA
RUBERRY, PHARES, ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
Attorneys for Amicus Curiae
Council on Labor Law Equality

EDWIN VIEIRA, JR.
ROSSIE D. ALSTON, JR.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
Attorneys for Amicus Curiae
National Right to
Work Legal Defense Foundation

OPINION OF THE COURT

GARTH, *Circuit Judge:*

On this appeal, the Union (Local 3, International Association of Bridge, Structural and Ornamental Ironworkers) and the Company (John Deklewa & Sons) seek review of an order entered by the National Labor Relations Board ("Board") on February 20, 1987.[1] That order, which overturned an earlier rule (the *R.J. Smith* rule)[2] promulgated by the board, held that: (1) pre-hire agreements sanctioned under § 8(f) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(f), are not voidable at will; (2) that the employer, John Deklewa & Sons ("Deklewa" or "the Company") committed an unfair labor practice in violation of § 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), when it repudiated its pre-hire agreement with the International Association of Bridge Structural and Ornamental Iron Workers, Local 3, AFL-CIO ("the Union"); (3) that Deklewa's obligation to bargain with the Union, because it was based on the pre-hire agreement, expired with that agreement; and (4) that these holdings should be applied retroactively. The Board has cross-petitioned for enforcement of its February 20, 1987 order.

Both the Union and the Company in petitioning for review of the Board's order challenge different features of the Board's rulling. Deklewa contends that the Board erred in finding that pre-hire agreements were not unilateraly voidable. The Union, while agreeing with the Board that pre-hire agreements should not be unilaterally voidable,

---

[1]The Board's decision is reported at 282 NLRB No. 184, 124 LRRM 1190 (1987).

[2]See R. J. Smith Construction Co., 191 NLRB 693 (1971), *enforcement denied sub nom.* Operating Engineers Local 150 v. NLRB, 480 F.2d 1186 (D. C. Cir. 1973).

claims the Board erred in holding that an employer's duty to bargain with the Union terminates upon the expiration date of the pre-hire agreement.

I.

Deklewa is engaged in the construction business. In June 1960, although not a member of the Ironworker Employers Association of Western Pennsylvania (the "Association"), Deklewa agreed to be bound by the agreement between the Association and the Ironworkers Union. Deklewa adhered to each successive agreement between the Association and the Union, for a twenty year period between June 24, 1960 and October 1, 1980. In October 1980, Deklewa joined the Association as a member. The pre-hire agreement in dispute covered the years 1982 to 1985.

Deklewa has engaged in a number of projects which required ironworkers. When it performed the work itself, Deklewa hired inronworkers through the union hiring hall. When Deklewa engaged subcontractors, it subcontracted only to companies bound by the same union agreement. In September 1983, during the term of the 1982-1985 agreement, Deklewa resigned from the Association and notified the Union that it was repudiating the agreement. Deklewa then subcontracted iron work to an employer who was not a party to the Union agreement. On October 14, 1983, the Union filed the instant unfair labor practice charge.

The Board agreed to hear the case based on a stipulated set of facts. As we have noted, the Board, in a ruling which reversed its prior construction of the Act, held that Deklewa had violated § 8(a)(5) of the Act by unilaterally repudiating the 1982-1985 agreement, but further held that after the agreement had expired in 1985, Deklewa was not

obligated to bargain with the Union. The board also held that its decision would apply to Deklewa's case and to all cases then pending as well as all cases in the future.

The Board based its decision on a detailed examination of the legislative history of the Act and in particular § 8(f). In order to understand the Board's order and to provide the context in which to analyze its decision, we too, turn to the legislative history of § 8(f).

II.

A.

Section 9(a) of the Act, 29 U.S.C. § 159(a) provides that "a representative . . . designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining . . . " Section 8(a)(5) of the Act imposes upon an employer whose employees "designate or select" an exclusive representative, the "duty to bargain collectively with the representative of his employees." 29 U.S.C. § 158(a)(5). The Act does not provide for the method by which the employees choose their representative. However, employees may compel recognition of their designated union representative as their exclusive bargaining agent by prevailing in an election and by certification of the union by the NLRB. 29 U.S.C. § 159(b),(c).

The majority status of a union as the exclusive representative of the employees, once established, is irrebuttably presumed for a reasonable period of time.[3] Upon the expiration of a collective bargaining agreement, the

---

[3]*See* Brooks v. NLRB, 348 U.S. 96 (1954); Toltec Metals, Inc., v. NLRB, 490 F.2d 1122 (3d Cir. 1974).

employer may not withdraw recognition of the union unilateraly unless it has reasonable, good faith grounds for believing that the union has lost its majority status. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 n.11 (1969); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir.), *cert. denied*, 423 U.S. 1016 (1975); *NLRB v. Frick and Co.*, 423 F.2d 1327, 1331 (3d Cir. 1970).

As is apparent from the statute and the case law construing it, the Act assumes that a stable group of employees who are capable of designating a union representative or participating in a certification election are employed by management in a continuing work relationship.[4] This assumption works well for employer-employee relations in manufacturing and in many other fields of endeavor; it does not work well in the construction field. In the construction industry, work typically varies by the season and the size of the project. Workers do not usually remain at a single job site long enough to designate a union representative. Moreover, because of the mobility of the construction industry workforce, elections and Board certification many times prove impracticable.

As a consequence, this situation presented problems for both management and its employees. The employers sought accurate estimates of their labor costs when they bid on projects.[5] Having a guaranteed union contract was virtually a *sine qua non* toward meeting this goal. On the other hand, employees in the construction industry desired all the benefits of union reprsentation that were available

---

[4]*See generally*, Fall River Dyeing § Finishing Corp. v. NLRB, 107 S. Ct. 2225, 2238 n.15 (1987)

[5]*See* S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), reprinted in I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 424 (G.P.O. 1959) ("Leg. History").

to workers in other fields.[6] In an attempt to satisfy both of these interests, a pre-hire agreement practice developed in the construction industry. A pre-hire agreement is a contract agreed to by an employer and a union before the workers to be covered by the contract have been hired. *Roberts' Dictionary of Industrial Relations,* Third Edition 562 (1986). *See also* 29 U.S.C. 158(f).

With respect to industries other than the construction industry, the Board had determined that pre-hire agreements were illegal because they designated an exclusive union representative of the employees before an election had been held and before the union's majority status had been tested. Thus, when the Board assumed jurisdiction over the construction industry,[7] it was required to address the day to day practices of an industry whose oeprations violated the Act as interpreted and administered by the Board. Accordingly, the Board applied the general prohibition against pre-hire agreements to the construction industry and suggested that the industry petition Congress for an exception. *See generally NLRB v. Irvin,* 475 F.2d 1265, 1267 (3d Cir. 1973) *Daniel Hamm Drayage Co., Inc.,* 84 NLRB 458, 460 (1949) *enf'd* 185 F.2d 1020 (5th Cir. 1951).

B.

Thus begin an eight year effort which culminated in a number of amendments, including the addition of § 8(f), to the NLRA in 1959. It provides:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering

---

[6]*Id.*

[7]Ozark Dam Contractors, 77 NLRB 1136 (1948); Carpenters Local 74 (Watson's Specialty), 80 NLRB 533 (1948).

> employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction industry employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of the Act prior to the making of such agreement . . . *Provided* . . . That any [such] agreement shall not be a bar to a petition [for a representation election] filed pursuant to section 9(c). . . .
>
> 29 U.S.C. 158(f)

Other subsections of 8(f) which we have not quoted, allow construction industry pre-hire agreements to contain unin security clauses; exclusive hiring hall provisions; and job referral requirements. At the same time as § 8(f) was enacted, Congress also added 8(b)(7)(C) which, *inter alia,* prevents a union from picketing in order to force an employer to sign a prehire agreement.

Some of the effects of these statutory changes are clear—employers and unions in the construction industry are permitted to enter into pre-hire agreements which designate the union as the exclusive representative of a company's employees without a formal election, and the employees, now union members, may at any time vote to decertify the union as their exclusive representative utilizing the formal Board procedures. Two issues, however, were not resolved by § 8(f): (1) whether during its term a § 8(f) agreement is as binding and enforceable as any other union agreement, and (2) whether a § 8(f) agreement requires an employer to bargain with the union as the employees' "exclusive representative" *after* the pre-hire agreement has expired.

In the typical employer union context, the employer is bound to bargain with the exclusive representative even after the contract has expired. In such as case, recognition of the union can only be withdrawn if the employer has a reasonable, good faith elief that the union does not represent a majority of the employees. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 597 n.11 (1969); *NLRB v. Leatherwood Drilling Co.,* 513 F.2d 270 (5th Cir.), *cert. denied,* 423 U.S. 1016 (1975); *NLRB v. Frick and Co.,* 423 F.2d 1327, 1331 (3d Cir. 1970). After the expiration of a collective bargaining agreement both parties, the employer and the union, are not free from the strictures of the agreement until an "impasse" in negotiations is reached. *See generally, N.L.R.B. v. Katz,* 369 U.S. 736 (1962); *Taft Broadcasting Co. v. AFTRA,* 163 NLRB 475 (1967). The employer is then free to impose terms on the employees, and the employees in turn, may then picket, strike or exert other forms of pressure.

In *R.J. Smith Construction Co.,* 191 NLRB 693 (1971), *enf. denied sub nom. Local No. 150, International Union of Operating Engineers v. NLRB,* 480 F.2d 1186 (D.C. Cir. 1973), and *Ruttman Construction Co.,* 191 NLRB 701 (1971), the Board interpreted § 8(f) to mean that a "pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Ruttmann,* 191 NLRB at 702. The Board held that until that "further action" occurred, either party was free to repudiate the agreement.

Ruttmann followed the rule which the Board had announced in *R.J. Smith* explaining:

> Congress enacted Section 8(f) of the Act in recognition of special conditions that existed in the construction industry. These special conditions included the fact

> that employers not only needed an assurance that skilled labor would be available but needed a basis for estimating labor costs in bidding on construction contracts. Employees, on the other hand, were often denied the benefits of union representation because of the temporary and sporadic nature of their employment. It is clear, however, that in enacting Section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such pre-hire agreements without violating the Act. It does not mean that a failure to abide by such an agreement is automatically a refusal to bargain. In essence, therefore, this pre-hire agreement is merely a preliminary step that contemplates further action or the development of a full bargaining relationship: such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a pre-hire agreement.

Ruttmann, 191 NLRB at 702, 77 LRRM at 1498 (footnote omitted).

The *R.J. Smith* rule was rejected by the D.C. Circuit when that court denied enforcement in *Local No. 150 International Union of Operating Engineers v. NLRB,* 480 F.2d 1186 (D.C. Cir. 1973) *denying enforcement of R.J. Smith Construction Co.,* 191 NLRB 693 (1971). However, despite the rejection of the *R.J. Smith* rule in *Local 150,* the Board continued to adhere to the *R.J. Smith* pre-hire doctrine. Hence, it was not surprising that some three years after *Local 150* had been decided, the same issue surfaced in the same circuit in *Local Union 103 International Association of Bridge Structural Ornamental Iron Workers v. NLRB* 535 F.2d 87 (D.C. Circuit 1976). As could be anticipated, the *Local 103* court followed the

precedent announced in *Local 150* and once again rejected the *R.J. Smith* rule. The *Local 103* ruling, however, was reversed by the Supreme Court in *NLRB v. Local 103, International Association of Bridge and Ornamental Iron Workers (Higdon Construction Co.),* 434 U.S. 335, 341 (1978).

In *Higdon,* the Supreme Court reviewed and upheld the Board's *R.J. Smith* rule concluding "that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." *Id.* at 341.

Subsequent case law developed a complex, fact-specific analysis for determining what types of further actions would "convert" a § 8(f) pre-hire agreement into a full bargaining relationship under § 9(a). The complexities of the conversion analysis led to what the Board termed in its present *Deklewa* ruling "fractious litigation." 282 NLRB at ____, 124 LRRM at 1193. To forestall such litigation, the Board undertook a reconsideration of the *R.J. Smith* rule. Its reconsideration resulted inthe interpretation of § 8(f) which the Board seeks to enforce today by its cross-application.

III.

A.

In the instant case, the employer, Deklewa, unilaterally repudiated its pre-hire agreement with the Union. The Union then filed an unfair labor practice charge with the Board, asserting that Deklewa was not free to repudiate its agreement. The Union's unfair labor practice charge against Deklewa became the vehicle for the Board's reconsideration of the *R.J. Smith* rule. The Board ultimately

concluded that the *R.J. Smith* rule had proved inadequate, and that in practice the rule served to defeat the very interests that the Act and § 8(f) were designed to protect.

The Board then fashioned a new interpretation of § 8(f) which sought to accommodate both employers' and employees' interests. In response to the construction industry *employees'* concerns, that *R.J. Smith* permitted management to void pre-hire agreements at will, the Board held that § 8(f) agreements were no longer unilaterally voidable, and that until expiration they would be enforced by the Board. The Board also responded to construction industry *employers'* complaints that the "conversion doctrine", by which a pre-hire agreement is converted into a standard collective bargaining agreement, effectively operated to force them, unlike all other employers, to bargain with a union whose majority status had never been established. The Board in its present order, which we review here, abandoned the "conversion doctrine," and held that § 8(f) pre-hire agreements were only enforceable during the term of the agreement and could not be converted into traditional collective bargaining agreements with lingering rights and obligations absent an election and certification.

With respect to the specific case before it, the Board ordered Deklewa to make whole any employees that may have suffered losses as a result of Deklewa's failure to adhere to the pre-hire agreement until the expiration of the agreement in 1985. However, the Board declined to extend this make whole remedy beyond the expiration of the agreement. Thus, Deklewa was not held responsible for any losses which may have occured after the pre-hire agreement's expiration date. Not surprisingly, both Deklewa and the Union have challenged this decision and have petitioned for review.

B.

In reviewing the Board's interpretation of the Act, this court must determine if the Board's interpretation is reasonable. *Slaughter v. NLRB,* 794 F.2d 120 (3d Cir. 1986). Only "[i]nterpretations of the Act that are inconsistent with the statutory mandate, that frustrate the congressional policy, or that rest on an erroneous legal foundation" must be set aside. *Id.* at 125.

Given the deferential standard of review afforded the Board's interpretation of the Act, both Deklewa and the Union face a heavy burden unless as Deklewa at least claims, our established standard has given way to a definitive and independent interpretation of § 8(f) by the Supreme Court and is thus inapplicable in this proceeding. Deklewa argues that in two decisions interpreting § 8(f), *NLRB v. Ironworkers Local 103 (Higdon Construction Co.),* 434 U.S. 335 (1978) and *Jim McNeff, Inc. v. Todd,* 461 U.S. 260 (1983), the Supreme Court adopted the Board's construction as expressed in *R.J. Smith* as its own. Deklewa then contends that the Board is bound by the standard announced in those rulings.

Deklewa's argument is flawed. In neither case has the Supreme Court adopted the Board's *R.J. Smith* interpretation of § 8(f) as definitive and binding. Indeed in *Higdon,* as we have previously observed, the Supreme Court expressly noted that:

> We have concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory provisions.

434 U.S. at 341. The Supreme Court thus made clear that it was merely reviewing the Board's interpretation of § 8(f) and not substituting its own judgment or prescribing its own interpretation of the statute:

> The Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB v. Truck Drivers,* 353 U.S. 87,96 (1957); *NLRB v. Insurance Agents,* 361 U.S. 477, 499 (1960). Of course, "recognition of the appropriate sphere of the administrative power . . . obviously cannot exclude all judicial review of the Board's actions" *Ibid.* . . . In *American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965), the Court was "unable to find that any fair construction of the provisions relied upon by the Board . . . can support its finding of an unfair labor practice . . . [T]he role assumed by the Board . . . [was] fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." As we have explained, this is not the case here.

434 U.S. at 350.

While *McNeff* is not as explicit as *Higdon* in making clear that the Supreme Court was merely reviewing the Board's interpretation and not establishing one of its own, nowhere in the *McNeff* opinion does the Court hold that the statute requires § 8(f) agreements to be voidable. Furthermore, *McNeff* relies very heavily upon *Higdon* which did make clear that the Court was doing no more than

holding that the Board's reading of the act was reasonable. In addition, the issue of repudiation was not before the Court in *McNeff*, as the parties in the *McNeff* case were litigating over monies allegedly due pursuant to a contract that had not been repudiated.

Having rejected Deklewa's argument that the Supreme Court has adopted the *R.J. Smith* rule as its own, our task now requires us to review the Board's new § 8(f) interpretation to determine if it is reasonable and consistent with the Board's statutory mandate. We are mindful in so doing that while the Board's earlier interpretation of § 8(f) was sustained as reasonable by the Supreme Court (*Higdon*, 434 U.S. at 350), that interpretation did not preclude the Board from fashioning a more effective rule, once it determined that its earlier *R.J. Smith* rule was not serving its designed purpose. As decisional law has made clear, it is not the function of the courts to interpret § 8(f), nor is any initial interpretation of one act made by the Board to be deemed "frozen in concrete." See *Mosey Manufacturing Co., Inc. v. NLRB*, 701 F.2d 610, 612 (7th Cir. 1983) (discussing changes by the Board in various election rulings). Rather, our function as a reviewing court is to determine the reasonableness of the present reading of § 8(f), regardless of any earlier pronouncement made by the Board.

In fulfilling that function, we are fortunate here in having the benefit of the Board's explanation of its earlier adoption of the *R.J. Smith* doctrine; its extensive reasons for overruling that doctrine; and its persuasive analysis of Congress' intent and objectives which has now led the Board to restructure its § 8(f) interpretation. 282 NLBR at ____, 124 LRRM at 1190-93. Because we are obliged to refer to both the *R.J. Smith* rule adopted by an earlier Board and the *Deklewa* rule adopted by the present Board

we will identify the particular Board by reference to either the "*R.J. Smith* Board" or the "*Deklewa* Board."

IV.

The *Deklewa* Board characterized the *R.J. Smith* Board's action as follows:

> Past consideration of 8(f)'s statutory language and legislative history has been brief. In R.J. Smith, the Board merely recited the aforementioned congressional language recognizing the contempory contractual practice in the construction industry and the reasons for that practice. Then, after quoting Section 8(f) in full, the Board summarily identified the second proviso as the linchpin to interpreting the entire section and concluded that the proviso must have meant that Congress intended to permit testing an 8(f) signatory union's majority status during a contract term either by election *or* by litigation of refusal to bargain charges.

282 NLRB at ___, 124 LRRM at 1190.[8] The Deklewa Board in its re-examination of § 8(f) identified a number of significant problems with the earlier rule announced by the *R.J. Smith* Board. The *Deklewa* Board noted that there is no support in the legislative history or the language of the statute for the interpretation of § 8(f) that the *R.J. Smith* Board declared. More specifically, the *Deklewa* Board concluded that there is no support in the legislative history or the text of the act for allowing either party to unilaterally repudiate a § 8(f) agreement. The *Deklewa* Board observed

---

[8]The relevant text of § 8(f) has been reproduced in Section II.B. of this opinion. The second proviso of § 8(f) permits a representation election, pursuant to § 9(c) of the Act, to take place during the pendency of a pre-hire agreement.

"if the legislative history and statutory language . . . indicate anything, it is an intent by Congress to legitimate and make enforceable the array of construction industry bargaining, referral, hiring, and employment practices that the Board previously found to be unlawful, and thus unenforceable under the Act." 282 NLRB at ___, 124 LRRM at 1191.

Because we must review the *Deklewa* Board's actions for its reasonableness, we think it appropriate to quote those portions of the *Deklewa* Board's opinion which explain in detail why the *R.J. Smith* rule can no longer be sustained. Among other things, the *Deklewa* Board stated:

> We find that this law now often operates in a matter [sic] that contradicts the apparent congressional intent. For example, current law views an 8(f) agreement as merely a nonbinding and unenforceable preliminary step to the ultimate establishment of a collective-bargaining agreement that can be recognized and enforced under the Act. There is no express language in the legislative history or the text of the act declaring a congressional view that such collectible-bargaining agreements, specifically authorized by the Act, are nonbinding, unenforceable, or subject to repudiation at will. Congress plainly mandated that 8(f) agreements be voluntary. Yet, contrary to the assertion in Ruttmann and R.J. Smith, it simply does not necessarily follow that because an 8(f) agreement can only be entered into voluntarily either party to the agreement is unfettered in its right "voluntarily" to repudiate the agreement.

* * *

> In this regard, we believe that there has also been a critical distortion of the significance of the second proviso to Section 8(f) and its role in preserving employee free choice. It is clear that the proviso permits inquiry into a union's majority status during a contract term. There is, however, a significant distinction between permitting such an inquiry through the Board's representation processes—the mechanism expressly mentioned in the provision—and permitting unilateral anticipatory repudiation of a collective-bargaining agreement prior to resolution of an inquiry in unfair labor practice proceedings. Because such a right of unilateral repudiation is so antithetical to traditional principles of collective-bargaining under the Act, it seems likely that Congress would have expressly stated such a right if it intended to create one.

282 NLRB at ___, 124 LRRM at 1191 (footnotes omitted).

The *Deklewa* Board identified the overarching objectives of the Act as promotion and protection of employee free choice and labor relations stability. It then tested the *R.J. Smith* rule by the degree to which it satisfied those objectives. In holding that the *R.J. Smith* rule failed this test, the *Deklewa* Board went on to state:

> [The] pivotal argument in R.J. Smith is simply wrong. A rule granting unilateral repudiation rights to an employer who voluntarily enters into a collective-bargaining agreement is not a necessary predicate for advancement of the employee free choice principles embodied in the second proviso. . . . [U]nder current 8(f) law, an employer's decision to repudiate may be based on the employer's own economic considerations, without reference to or concern for the employees' desire to continue the status quo. Even if the

employer has a legitimate question as to its employees' representational desires. Congress has expressly provided an electoral mechanism for testing them. Accordingly, in our view, it is more anomalous to hold, as in R.J. Smith, that a proviso enacted to preserve employees' right to choose, change, or reject their own collective-bargaining representative can serve as a basis for an employer unilaterally to repudiate a voluntary collective-bargaining agreement for any reason it chooses.

* * *

The Board's decision in R.J. Smith and its conversion doctrine fare no better when measured against the congressional objective of fostering labor relations stability in the construction industry. First, it is obvious that a rule that sanctions unilateral contract repudiation and the inevitable disruptions that result is not conducive to labor relations stability. The Board in R.J. Smith did not even allude to such potential for disruptions, nor did it attempt to reconcile this potential with Congress' desire in enacting 8(f) for preserving contracts in the construction industry. Indeed, although we now view R.J. Smith and its progeny as a failed attempt to effectuate free choice, we also find that this attempt unnecessarily deemphasized stability in the industry.

282 NLRB at ___, 124 LRRM at 1192 (footnotes omitted).

In short, the *Deklewa* Board concluded:

In summary, we conclude that the Board's 8(f) law, as it currently operates, does not comport fully with Section 8(f)'s text and legislative history, is not the best way to advance employee free choice and labor relations stability in the construction industry,

> and entails evidentiary determinations that are inexact, impractical and generally insufficient to support the conclusions they purport to demonstrate. Accordingly, we overrule R.J. Smith. . . .

282 NLRB at ___, 124 LRRM at 1193.

Having found the *R.J. Smith* rule inadequate to serve the Congressional intent and purposes of § 8(f); the *Deklewa* Board then discussed those alternatives which satisfy the protection of employee free choice and labor relations stability. To achieve those purposes, the *Deklewa* Board rules that a § 8(f) pre-hire agreement was to bind the parties for its duration but upon expiration of such a pre-hire agreement, all collective bargaining obligations would cease. In so ruling, the *Deklewa* Board also provided that a § 8(f) agreement could not be converted into a § 9(a) agreement, i.e., that a union which was a representative pursuant to a § 8(f) pre-hire agreement, could not be converted into a traditional exclusive representative with majority status with whom the employer was required to bargain, absent an election and certification.

The *Deklewa* Board, obviously recognizing that agency re-interpretations of the Act are not undertaken lightly and that in order to be justified, a more appropriate balance must be struck between the Congressional policies embodied in § 8(f) and the Act as a whole, took pains to explain the reasons for its change of mind. We reproduce that statement here:

> We have not merely parsed the case precedent and legislative history in order to arrive at yet another "tenable" construction of the statutory language. Rather, consistent with our mission as the administrative agency responsible for enforcing the NLRA, we

> have applied our cumulative individual and institutional experience and expertise toward achieving, consistent with our interpretation of the legislative intent, what we perceive to be a better application of the statute. Given the present state of the law in this area, we see no alternative but to exercise our prerogative to do so. Admittedly, we have not been able in this one decision to anticipate every ramification of the principles we announce today. Nor do we deem it wise to attempt to do so, since we hope to be afforded the latitude to employ, as we have in the past, the fine crucible of case-by-case experience in which to test and refine these principles, and which the administrative process itself makes possible.

282 NLRB at ___ n. 40, 124 LRRM at 1194 n. 40.

The Board then summarized the actions which it had taken in its reformulation of § 8(f):

> [The] basic principles we advance today provide an overall framework for the interpretation and application of Section 8(f) which will enable parties to 8(f) agreements and employees to know their respective rights, privileges, and obligations at all stages in their relationship. When parties enter into an 8(f) agreement, they will be required by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e).

282 NLRB at ___, 124 LRRM at 1194.

Having analyzed the *Deklewa* Board's reasons for rejecting the *R.J. Smith* rule and its reasons for adopting the *Deklewa* rule we cannot say that the Board's actions in both regards were unreasonable. Neither the Company nor the Union has demonstrated by their arguments that the Board's *Deklewa* interpretation of § 8(f) is inconsistent with the Congressional mandate or that it would frustrate, rather than further, congressional policy. *See Slaughter v. NLRB,* 794 F.2d 120 (3d Cir. 1986). Whle it is true that the Board's new interpretation varies from its prior interpretation, that variance is not fatal so long as the interpretation is reasonable and consistent with the Act. As the Supreme Court has instructed in *Higdon* "an administrative agency is not disqualified from changing its mind." *Higdon,* 434 U.S. at 351.[9]

Our independent analysis of both the legislative history and the text of the statute itself, reveals no viable ground on which to challenge the reasonableness of the Board's *Deklewa* interpretation. In reviewing the *Deklewa* Board's analysis, we are satisfied that the Board, by steering a middle course, reasonably balanced the interests of labor and management. "The function of striking that balance to effectuate National Labor Policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review," *NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957).* Reviewed under our Slaughter[10]

---

[9]As Justice Frankfurter once commented: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters National Bank and Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[10]Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986), *and see* Part III. B. *supra.*

standard, the Board's new interpretation must be sustained.

V.

The final issue raised by the parties is the Board's decision to apply its new interpretation to this case and to all pending cases at whatever stage.[11] The parties disagree as to whether this new rule, announced by the Board in *Deklewa* may be applied retroactively.

After setting forth its new interpretation of § 8(f), the Board confronted the final issue of whether or not its new rule should be applied retroactively. The Board noted that its usual practice was to apply new policies and standards to all cases no matter what stage in the litigation they had reached. 282 NLRB at ___, 124 LRRM at 1198. Although the Board noted that its new interpretation represented a "sharp departure" from the *R.J. Smith* rule, it nevertheless determined that a retroactive application of this rule was appropriate.

A.

As with all legal issues, we first determine our standard of review. At the outset we observe that Deklewa and the Associated General Contractors of America, which filed a brief as *amicus curiae,* urge that we review the retroactivity issue using an abuse of discretion standard. The Union, in its reply brief, apparently agrees with that standard. Reply Brief of Union at 17. We have been unable to discern from the brief filed by the Board, any suggested standard of review respecting just the issue of retroactivity. In any event, none of the parties have cited us to any

[11] 282 NLRB at ___, 124 LRRM at 1198.

caselaw which would inform us as to the standard we should employ.

Our independent research reveals that with specific reference to a Board's ruling on retroactivity, the Second Circuit has held that "while we are of course not bound by the Board's views on retroactive application, we should defer to them absent some manifest injustice." *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 8892 (2d Cir. 1983). We agree with the *Semco* standard, particularly since it comports with our oft spoken view that in matters involving interpretation of the Act, the Board is entitled to deference.[12] *See e.g. E. I. Dupont DeNemours and Co. (Chestnut Run) v. NLRB*, 733 F.2d 296, 297 (3d Cir. 1984). While a decision to hold a new rule retroactive is not strictly a question of statutory interpretation, we are nevertheless persuaded that when the Board changes a rule and makes it retroactive, particularly when the Board assigns as its reasons for doing so the furtherance of the fundamental statutory policies of employee free choice and labor relations stability, the Board should be entitled to exercise its broadest power. *See e.g. Mosey Manufacturing Co., Inc. v. NLRB*, 701 F.2d 610, 612 (7th Cir. 1983). Thus, unless the Board's retroactive application results in manifest injustice, we will uphold the Board's order.

B.

In the present case the Board recognized all interests of all parties. It identified each interest and related the interests involved to the purposes of the Act. The Board

---

[12]The result we reach today, would have been the same had we adopted the abuse of discretion standard, as urged upon us by Deklewa, the Union, and the *amicus*. In light of the Board's analysis and reasoning, we would be hard-pressed to hold that the Board's retroactivity decision was not an appropriate exercise of its discretion.

considered the Act's policies of employee free choice and labor relations stability, and it examined the problems that would be entailed if it applied the now disclaimed *R.J. Smith* rule to pending § 8(f) cases. The Board, employing the retroactivity analysis of *SEC v. Chenery,* 332 U.S. 194 (1947), balanced the claimed ill effects of retroactivity against the "mischief of producing a result which is contrary to a statutory design or to legal and equitable principles," *Id.* at 203, and concluded:

> [T]he statutory benefits from the announced changes in 8(f) law for employees, employers and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes. Consequently, we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage.

282 NLRB at ___, 124 LRRM at 1198.

We cannot perceive any "manifest injustice" which would indicate that we should not defer to the Board's reasoning on this issue. As the Board noted, a party such as Deklewa who relied on the *R.J. Smith* rule did so at its own risk, because once conversion occurred, the § 8(f) agreement would be automatically binding. The particular facts of this case aptly demonstrate this possibility.

Nor would our result be different if we engaged in an independent analysis under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) or *Chevron v. Huson,* 404 U.S. 97 (1971). The five factor analysis of *Chenery* is substantively no different than the three factor analysis of *Chevron. Chenery,* however, has been applied exclusively to administrative agency adjudications, the same context in which this case has arisen. *See e.g.* E. L. Weigand Division v. NLRB, 650 F.d 463, 471 (3d Cir. 1981) *Huson* on the other hand, appears to have been applied exclusively to judicial adjudications. As noted above, however, on this record an independent analysis under either test would reach the same result here.

In 1980, Deklewa became a member of the Iron Workers Employer Association of Western Pennsylvania, Inc. ("the Association") an organization composed of approximately 35 construction industry employers. In so doing, pursuant to a doctrine established by the Board in 1978, known as the merger doctrine[13] the relevant unit of employees for determining the majority status of a Union was not those employees specifically employed by Deklewa but was rather all other employees who where hired under the Association's agreement with the Union.

The factors which would have established the multi-employer unit of employees as having obtained majority status plainly appear on the stipulated record submitted by the parties to the Board and which is before us now.[14]

---

[13]This merger doctrine was established by the Board in Amado Electric, 238 NLRB 37, 99 LRRM 1453 (1978); and Authorized Air Conditioning Company, 236 NLRB 131, 98 LRRM 1538 (1978), *enf'd on other grounds*, 606 F.2d 899 (9th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). The essence of the rule held that:

> [W]hen a single employer joins a multi-employer association and adopts that associations' collective bargaining agreement, the single employer's unit "merges" into the multi-employer unit when the requisite inquiry into majority support occurs in that multi-employer unit.

Deklewa, 282 NLRB at ___, 124 LRRM at 1189 § n. 14.

[14]Among the factors which appear of record are: 1. a union security clause in the agreement between the Association and the Union (App. at 44); 2. actual union membership of a majority of the employees (App. at 31); and 3. all job referrals came from the Union's hiring hall. (App. at 30).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Continued on next page)

Thus, even under the old *R.J. Smith* rule it appears entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the Union.

Moreover, as the Board correctly points out in applying its new interpretation of § 8(f) to Deklewa's case, it has done nothing more than hold Deklewa and the Union to the terms and conditions of the § 8(f) contract into which they voluntarily entered. It was with these considerations in mind that the Board held *Deklewa* and all pending cases, subject to the new § 8(f) principles now adopted. We find no manifest injustice in that decision.

VI.

Thus, both Deklewa's and the Union's petitions for review will be denied and the Board's cross-application for enforcement will be granted.

(Continued)

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

April 12, 1988

TO: Stanford A. Segal, Esq.
(Laurence Gold, Esq.
(David M. Silberman, Esq.
(Aileen A. Armstrong, Esq.*
(Patrick Szymanski, Esq.
(Linda J. Dreeben, Esq.
Charles R. Volk, Esq.
Philip A. Miscimarra, Esq.
Gerard C. Smetana, Esq.
Rossie D. Alston, Jr., Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case Nos. 87-3121, 87-3192, 87-3231 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct

and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

0-J
Rev. 9-85
sa

Direct Dial 597-3135

*bill of costs form attached

Filing Time

A petition may be filed within 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The petition must be *received* in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, the petition shall contain, so far as is pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],

Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

Counsel is reminded that sanctions may be imposed for the filing of a frivolous petition for rehearing. *See* Fed. R. App. P. 46(c).

Form

The 15 page limit allowed by the Rule shall be observed.

Number of Copies

An original and 14 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Rev. 9-85

Rule 22.1

Attachments Attach to each petition for rehearing a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Bill of Costs (FRAP 39)

Filing Time A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be *received* in the Clerk's office within the 14 day period.

Form Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

Mandate (FRAP 41)

Issuance Time The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if parties intend to file a petition for writ of certiorari to the Supreme Court of the United States.

SALLY MRVOS,
Clerk

Enclosures

Rev. 5/86

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

JOHN DEKLEWA, THEODORE DEKLEWA AND ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC. and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 3, AFL-CIO	**Case 6-CA-16819**

DECISION AND ORDER

The issue presented here is whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by repudiating its collective-bargaining agreement entered into with the Union under the provisions of Section 8(f) of the Act, and by withdrawing recognition from the Union. In addition, this case generally raises important questions concerning the Board's interpretation of Section 8(f). For the reasons set forth below, we have decided that it is necessary to modify current Board law regarding Section 8(f) in order to serve better the policies and purposes of the Act as applied to the unique circumstances of construction industry labor relations.

Upon charges filed by the Union, the General Counsel of the Board issued a complaint and notice of hearing 28 November 1983 and an amendment to complaint 9 March

1984 against the Respondent. The complaint alleged that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by repudiating its collective-bargaining agreement with the Union and by withdrawing recognition from the Union.

Copies of the charges and complaint were duly served on the Respondent and Union. On 6 December 1983 the Respondent filed its answer to the complaint denying the commission of any unfair labor practices.

On 3 May 1984 the Respondent, the Union, and the General Counsel filed with the Board a Stipulation of Facts with attached exhibits, and moved to transfer this proceeding to the Board.

The parties agreed that the stipulation and exhibits constitute the entire record in this case and that no oral testimony is necessary or desired to be introduced by any of the parties. The parties waived a hearing before an administrative law judge and the issuance of a decision and recommended order by an administrative law judge, and they stated a desire to submit this case directly to the Board for findings of fact, conclusions of law, and a Decision and Order.

On 15 October 1984 the Board issued an Order granting the motion, approving the stipulation, and transferring the proceeding to the Board. On 3 February 1986 the Board scheduled oral argument in this proceeding and related cases[1] because they presented important issues in the administration of the Act. The notice of hearing stated that the Board would entertain argument on the issues

---

[1] *Reliable Electric Co.*, Case 27-CA-8682; *Viola Industries-Elevator Division, Inc. and its alter ego Viola Industries*, Case 5-CA-15990.

raised under Section 8(f) of the Act by the several cases, with particular emphasis on the following questions:

> (1) Whether a Section 8(f) contract/relationship can attain the status of a Section 9 contract/relationship absent certification or voluntary recognition, and, if so, what evidence is sufficient to attain such status;
>
> (2) To what extent should the Board's contract bar rules and presumptions of majority status apply in the construction business; and
>
> (3) How do the above questions apply in a multi-employer context with specific reference to appropriate unit issues and the nature of the employer's workforce (i.e., permanent and stable or project by project).

An order and supplement to notice of hearing issued 12 March 1986.

On 24 March 1986 the Respondent, the General Counsel, the Union, the American Federation of Labor and Congress of Industrial Organizations, the AFL-CIO's Building and Construction Trades Department, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Associated Builders and Contractors, Inc., the Council on Labor Law Equality, and the National Right to Work Legal Defense Foundation, Inc.[2] presented oral argument before the Board. The parties and the amici curiae have filed briefs and statements of position.

---

[2]The AFL-CIO, its Building and Construction Trades Department, the Teamsters, the Associated Builders and Contractors, the Council on Labor Law Equality, and the National Right to Work Legal Defense Foundation appeared as amici curiae.

On the basis of the stipulation, the briefs, and the oral arguments, the Board makes the following

Findings of Fact

I. The Business of the Respondent

Respondent John Deklewa & Sons, Inc., a Pennsylvania corporation, has an office in Bridgeville, Pennsylvania, where it is engaged in the business of heavy construction. Respondent John Deklewa & Sons, a partnership with an office at the same location as the Respondent Corporation, is engaged in the construction of commercial and industrial buildings. In the operation of their businesses, the Respondents annually purchase and receive goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

It is admitted, and we find, that at all times material here, the Respondents are employers within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act. Accordingly, we find that it will effectuate the policies of the Act for the Board to assert jurisdiction here. Further, the parties stipulate, and we find, that the Respondents constitute a single employer within the meaning of the Act.

II. The Labor Organization Involved

The parties stipulate, and we find, that International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Stipulated Facts

As stated, the Respondent, John Deklewa & Sons, is engaged in the construction of commercial and industrial buildings. The Iron Workers Employer Association of Western Pennsylvania, Inc. (the Association) is an organization composed of approximately 35 construction industry employers. The Association represents its employer-members in negotiating and administering collective-bargaining agreements with the Union. The Association and the Union have been parties to successive collective-bargaining agreements for at least the past 30 years, the most recent relevant contract having been effective 1 June 1982 through 31 May 1985.

On 24 June 1960 the Respondent entered into a prehire agreement with the Union under which the Respondent agreed to be bound by the provisions of the contract between the Association and the Union. For the next 20 years the Respondent executed and adhered to the successive Association-Union collective-bargaining agreements. The Respondent did so as a separate entity and not by virtue of any membership in the multiemployer group.

In June 1980 the Respondent became a member of the Association, and subsequently executed the 1982-1985 agreement with the Union. This contract had a 60-day notice of termination provision, an exclusive hiring hall provision, and a union-security clause. On 21 September 1983 the Respondent timely resigned its membership in the Association. The Association has not opposed this resignation, but it considers the Respondent bound to the terms of the 1982-1985 agreement. On the same date that it resigned from the Association, the Respondent notified

the Union that it was repudiating the contract and withdrawing recognition. The Respondent was not engaged in any construction projects on 21 September 1983 on which it directly employed employees covered by the 1982-1985 labor agreement, and from that date until the 3 May 1984 date of the parties' stipulation the Respondent has not directly employed any such employees.

By letter dated 27 September 1983, the Union objected to the Respondent's repudiation of the agreement and withdrawal of recognition. The Union filed a grievance on 30 September 1983 alleging that the Respondent violated the subcontracting clause of the 1982-1985 agreement in connection with a project that extended from 7 September to 14 December 1983. On 3 October 1983 the Association advised the Respondent of the grievance and of what it believed were the Respondent's obligations under the grievance-arbitration procedure of the 1982-1985 agreement. The Respondent has taken the position that the dispute is not arbitrable in view of its resignation from the Association and its repudiation of the contract. Further action on the grievance was held in abeyance pending the outcome of this case.

The parties stipulated that from June 1960 until its September 1983 repudiation: the Respondent relied exclusively on the Union's hiring hall for its ironworkers; all these employees were union members; they were hired on a jobsite-to-jobsite basis; and the Respondent adhered to the terms of the applicable collective-bargaining agreement on all its projects. On many of these projects the Respondent did not hire ironworkers directly, but used subcontractors who were signatory to the Union-Association agreement.

At all times material here, approximately 30 of the 35 members of the Association have, on a continual and regular basis, been engaged in projects requiring the direct employment of employees covered by the Association-Union agreement. These employees have been members of the Union or have adopted the Union as their collective-bargaining representative. A majority of such employees moved from job to job and from employment by one member of the Association to another in response to work opportunities. Between 1 June 1982 and the date of the stipulation here, the Respondent engaged in three projects on which it directly employed employees covered by the 1982-1985 agreement, the last of which was completed in April 1983.

B. Section 8(f)

Section 8(f) of the Act reads as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the

employer to notify such labor organization of opportunitites for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Positions of the Parties

The Board has asked the parties and amici to express their views on the broad question of whether the Board should continue to adhere, in whole or in part, to the current body of law interpreting and applying Section 8(f). Specific focus has been placed on the Board's decision in *R. J. Smith Construction Co.,* 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB,* 480 F.2d 1186 (D.C. Cir. 1973), and the associated "conversion doctrine," whereby an 8(f) relationship/agreement can "convert" into a 9(a) relationship/agreement by means other than a Board election or voluntary recognition. Another concern has been the definition of appropriate units in the construction industry, particularly where multiemployer associations are involved, for purposes of assessing challenges to a union's contract and representational claims.

The General Counsel urges adherence to *R. J. Smith* and the conversion doctrine in both single employer and

multiemployer cases. Accordingly, the General Counsel contends that the Respondent violated Section 8(a)(5) and (1) by repudiating the contract and withdrawing recognition because the Union enjoyed prior majority status in a multiemployer unit. The ABC, the Council on Labor Law Equity, and the National Right to Work Legal Defense Foundation also urge adherence to the holding in *R. J. Smith,* but they argue that the Board should adopt rules providing that an 8(f) relationship/agreement can never convert to 9(a) status in either single or multiemployer units by means other than Board certification or voluntary recognition. This rationale would result in dismissal of the complaint here.[3] The AFL-CIO, its Building and Construction Trades Department, and the Teamsters argue that the Board should overrule *R. J. Smith* and abandon the conversion doctrine. They urge the Board to adopt the position that Section 8(f) provides "an alternative means" by which unions in the construction industry can obtain the full status of exclusive representative within the meaning of Section 9(a) in both single and multiemployer units. Applied here, this rule of law would warrant finding a Section 8(a)(5) violation by the Respondent.

Discussion and Conclusions

We have decided to overrule the Board's decision in *R. J. Smith,* to abandon the so-called conversion doctrine, and to modify relevant unit scope rules in 8(f) cases. We shall apply the following principles in 8(f) cases: (1) a collective-bargaining agreement permitted by Section 8(f)

[3]In addition to this argument, the Respondent contends that it was privileged to withdraw recognition and repudiate the contract because it employed no ironworkers from April through September 1983 and none were employed when it resigned from the Association and repudiated the contract.

shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

In taking this action we recognize that the Supreme Court has stated, concerning major portions of current 8(f) law, that "the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the relevant statutory sections." *NLRB v. Iron Workers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978) (*Higdon*). It is our view, however, that the development of the current law under *R. J. Smith* and *Higdon* has exposed significant deficiencies. The principles we advance today represent a more appropriate interpretation and application of Section 8(f), and they will better serve the statutory policies of protecting labor relations stability and employee free choice in the construction industry.

Current State of Section 8(f) Law

The Board's current law, first announced in *R. J. Smith*, defines three stages in an 8(f) relationship: preconversion, when Section 8(f) principles apply; the conversion process itself; and postconversion, when 9(a) principles are applicable.

In *R. J. Smith* and a companion case, *Ruttmann Construction Co.*, 191 NLRB 701 (1971), the Board ruled that an 8(f) agreement is "a preliminary step that contemplates

further action for the development of a full bargaining relationship." *Ruttmann*, supra at 702. During this preliminary step, the Board held, an 8(f) agreement confers no presumption of majority status immunizing the signatory union's status as collective-bargaining representative from challenge during the contract term. The agreement itself also has no immunity. It can be repudiated by either party, at any time, for any reason, and it cannot be enforced through Section 8(a)(5) or Section 8(b)(3). An employer signatory to an 8(f) agreement can test the union's status by unilaterally repudiating the agreement and litigating the union's status in an ensuing 8(a)(5) proceeding. Finally, the express language of the second 8(f) proviso precludes raising an 8(f) agreement as a bar to a Board electoral test of the union's status.

Both *R. J. Smith* and *Ruttmann* indicated, however, that upon an appropriate showing an 8(f) relationship/agreement can convert to a 9(a) relationship/agreement.[4] As developed in subsequent cases[5] conversion required a showing that the signatory union enjoyed majority support, during a relevant period, among an appropriate unit of the signatory employer's employees. The achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process.

The Board has found various evidentiary showings sufficient to establish the requisite "majority support" for conversion. Findings of majority support have been based on the presence of an enforced union-security clause,[6]

---

[4]*R. J. Smith*, supra at 695 fn. 5; *Ruttmann*, supra at 702.

[5]See, e.g., *Irvin-McKelvy Co.*, 194 NLRB 52 (1971); *Hageman Underground Construction*, 253 NLRB 60 (1980).

[6]*Irvin-McKelvy Co.*, supra at 53.

actual union membership of a majority of unit employees,[7] as well as referrals from an exclusive hiring hall.[8] The Board has also deemed relevant such evidence as an employer's contribution to a union-administered fringe benefit fund[9] or employee statements and actions that indicate union support.[10]

Concerning the "relevant period" aspect of the conversion process, the Board normally does not seek to determine whether the union enjoys majority support at the time the agreement is repudiated.[11] Rather, "[t]he relevant period for a meaningful showing of majority support is normally within the effective term of the applicable collective-bargaining agreement." *Construction Erectors*, 265 NLRB 786, 787 fn. 11 (1982); see also *Barwise Sheet Metal Co.* 199 NLRB 372, 378-379 (1972).[12] While this is the general rule, the relevant period has been found to be as many as 10 years prior to the contract repudiation. See *Carrothers Construction Co.*, 258 NLRB 175 fn. 1 (1981) (1976 repudiation found unlawful based on 1966 showing

---

[7]*Pacific Erectors*, 256 NLRB 421, 424 (1981).

[8]*Construction Erectors*, 265 NLRB 786, 788 (1982).

[9]*Davis Industries*, 232 NLRB 946, 952 (1977).

[10]*Amado Electric*, 238 NLRB 37, 39 (1978).

[11]Issues concerning conversion can arise, of course, in a variety of ways. We shall usually refer here, however, only to the most common, which is repudiation.

[12]In *Hageman Underground Construction*, 253 NLRB 60 (1980), an administrative law judge found that the 8(f) agreement at issue had not converted to a 9(a) agreement because it was not demonstrated that the union enjoyed majority support at the time of repudiation. The Board reversed, relying on the fact that the union had achieved majority during the contract term. It stated that "inquiring into the Union's majority status at the time of the contract's repudiation . . . would be both irrelevant and improper." 253 NLRB at 62 (footnote omitted).

of majority support).[13] Finally, an important corollary to these rules concerning the relevant period for the conversion process is the rule that conversion can occur "within a matter of days" of the initial 8(f) agreement. *Pacific Intercom*, supra at 191; indeed, it can occur *immediately* upon the parties' adoption of an 8(f) agreement, if, at the time of adoption, the signatory union enjoys majority support among an existing employee complement. *Wheeler Construction Co.*, 219 NLRB 541, 542 (1975); cf. *Carrothers Construction Co.*, supra at 175 fn. 1.

As for the appropriate unit in determining whether conversion has occurred, the Board has developed different rules that apply depending on (1) the nature of the employer's work force, and (2) whether the inquiry concerns a single employer or a multiemployer context. Regarding the nature of the work force, the Board has distinguished between "permanent and stable" and "project-by-project" work forces. See, generally, *Dee Cee Floor Covering*, 232 NLRB 421 (1977); *Precision Striping*, 245 NLRB 169 (1979). If an employer utilizes a permanent and stable work force, that entire work force will constitute the appropriate unit for ascertaining whether the union enjoys majority support. See, e.g., *Construction Erectors*, 265 NLRB 786 (1982). If the employer utilizes a project-by-project work force, the Board will inquire into the union's majority support only on individual existing projects. See, e.g., *Dee Cee Floor Covering*, supra; *Giordano Construction Co.*, 256 NLRB 47 (1981).

All of the foregoing rules presume a single employer unit. The Board's inquiry into majority support varies slightly in a multiemployer context. The Board has held

---

[13]See also *Pacific Intercom*, 255 NLRB 184, 191 (1981) (1979 repudiation found unlawful based on 1972 showing of majority support).

that when a single employer joins a multiemployer association and adopts that association's collective-bargaining agreement, the single employer's unit "merges" into the multiemployer unit and the requisite inquiry into majority support occurs in that multiemployer unit.[14]

Under existing law, when the Board determines that conversion has occurred, it holds that the 8(f) union acquired immediate and complete 9(a) status, and any collective-bargaining agreement in effect immediately acquired the status of a collective-bargaining agreement enforceable before the Board. *Hageman Underground Construction,* 253 NLRB 60 (1980); *Precision Striping,* supra. Accordingly, upon conversion, an employer is "under the statutory duty to recognize and bargain with the union as the employees' exclusive representative," *Davis Industries,* 232 NLRB 946, 952 (1977), and it is prohibited from repudiating the contract or withdrawing recognition from the union. *Irvin-McKelvy Co.,* supra at 53. From the time of conversion, the union enjoys "an irrebuttable presumption of majority status for the duration of the agreement." *Hageman,* supra at 62. As is the case with any 9(a) representative, the union also enjoys a

---

[14] *Amado Electric,* 238 NLRB 37 fn. 1 (1978); *Authorized Air Conditioning Co.,* 236 NLRB 131 fn. 2 (1978). Although the Board found that the appropriate unit in each case was multiemployer in scope, it is unclear whether these cases dispensed with the requirement of majority support among the single employer's employees as a predicate to merger. As the Ninth Circuit correctly pointed out in enforcing *Authorized Air Conditioning* on other grounds, the evidence demonstrated that the Union enjoyed "majority support" in the single employer unit, and the court specifically rejected the notion that the multiemployer unit governed the inquiry's scope. 606 F.2d 899 (9th Cir. 1979). The same facts are also present in *Amado Electric.* We note that the Fifth Circuit has also declined to apply the merger rules alluded to in *Amado* and *Authorized Air Conditioning.* See *Baton Rouge Building Trades Council v. E. C. Schafer,* 657 F.2d 806 (5th Cir. 1981).

rebuttable presumption of majority status upon the contract's expiration. Finally, because the union enjoys an irrebuttable presumption of majority status during the contract's term, the converted agreement serves as a bar to any election petitions filed after conversion but during the contract term. Cf. *Albuquerque Insulation Contactor,* 256 NLRB 61, 63 fn. 5 (1981).

The full effects of conversion are dependent, in part, upon the nature of the employer's work force and whether the employer is part of a multiemployer association. For example, if the conversion occurs where the employer employs a permanent and stable work force, the union will enjoy full 9(a) status at all existing and future jobsites. See, e.g., *Construction Erectors*, supra.[15] If, however, the employer employs a project-by-project work force, the requisite showing of majority at one project will not carry over to any other existing or future project. *Dee Cee Floor Covering,* supra; *Giordano Construction,* supra. Accordingly, the union (and the contract) will enjoy 9(a) status only on the individual projects at which majority support was demonstrated.

In multiemployer situations, rules are the same regardless of the nature of the individual employer's work force. When conversion occurs and an employer joins a multiemployer association (adopting that association's agreement with the union), the relevant unit becomes that of the multiemployer association by application of the merger doctrine. *Amado Electric,* supra; *Authorized Air Conditioning,* supra. Section 9(a) status attaches to all

---

[15]Under this rule the Board presumes that the union's showing of majority support, which, as noted above, must be made in the permanent and stable unit to achieve conversion, carries over to all other present and future jobsites.

existing and future projects. The particular character of the individual employer's unit of employees, even if hired on a project-by-project basis, effectively becomes irrelevant because all majority support inquiries focus on the multiemployer unit.

The Shortcomings of the Current Law

Based on our expertise and in light of our experience in administering Section 8(f), we perceive several serious shortcomings in current Board law. These perceptions were reinforced at oral argument where both labor and management representatives expressed broad-based dissatisfaction and frustration with the current state of the law and the Board's conversion doctrine in particular. It is our view that the current 8(f) rules and procedures are substantially flawed in three basic respects. First, the current law does not fully square with either Section 8(f)'s legislative history or that section's actual wording. Second, the current law inadequately serves the fundamental statutory objectives of employee free choice and labor relations stability. Third, the frustration of statutory policies is increased because of the administrative and litigational difficulties created by the current law. Accordingly, we find it both necessary and appropriate to abandon the Board's existing interpretation of Section 8(f).[16]

The Legislative History and the Structure of Section 8(f)

In considering the 1959 amendments, Congress was confronted with a situation in which the Board had

---

[16]As reflected below, the current law's shortcomings exist at all three stages of the conversion process and in the rules defining appropriate units. Because these flaws permeate the entire existing 8(f) analytic scheme, we have determined that minor adjustments or changes to current law would not be sufficient to rectify its deficiencies.

departed from its pre-1948 practice under the Wagner Act by asserting jurisdiction over construction industry employers.[17] In so doing, the Board sought to apply principles that had been developed in a markedly different context to an industry which, independently of the Act, had established its own unique collective-bargaining practices.[18] It had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union for periods ranging from 1 to 3 years even before any employees had been hired. S.Rep., 1 Leg. Hist. 423. Such agreements often contained union-security clauses, exclusive referral provisions, and employee training and seniority requirements.[19] Congress found two reasons for this:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union.

S.Rep., 1 Leg. Hist. 424; see also H.Rep., 1 Leg. Hist. 777.[20]

Another important characteristic of the industry was sporadic employment relationships. In construction, an employee or group of employees "typically works for many employers and for none of them continuously. Jobs are

---

[17]See, e.g., *Ozark Dam Constructors*, 77 NLRB 1136 (1948); *Carpenters Local 74 (Watson's Specialty)*, 80 NLRB 533 (1948).

[18]See S.Rep. No. 187, 1 Leg. Hist. 423-425 (S.Rep.) and H.Rep. No. 741, 1 Leg. Hist. 777-778 (H.Rep.).

[19]See, e.g., *Daniel Hamm Drayage Co.*, 84 NLRB 458, 460 (1949).

[20]See also *Higdon*, supra at 348.

frequently of short duration, depending on various stages of construction." S.Rep., 1 Leg. Hist. 423. It was and, as indicated by the facts of this case, remains typical for an employee to be referred from a union hiring hall to one employer for a number of days or weeks and, upon completion of the work, to return to the hiring hall for referral to another employer.

As Congress stated, "serious problems" arose when the Board began to apply the pre-1959 Act to these unique practices and situations. S.Rep., 1 Leg. Hist. 423; H.Rep., 1 Leg. Hist. 777. In a series of cases, the Board had found unlawful the bargaining, referral, hiring, and employment practices common in the industry.[21] It also became clear that, because of the short and sporadic periods of employment typical to the industry, "[r]epresentational elections in a large segment of the industry are not feasible." S.Rep., 1 Leg. Hist. 451-452. Accordingly, when Congress considered the 1959 amendments it recognized that application of the pre-1959 Act to the construction industry would result in substantial instability in the industry by the invalidation of established industry practices while at the same time employees in the industry would be deprived of both the fruits of collective-bargaining as well as the freedom to express their desires concerning union representation.

Section 8(f)'s text reveals the mechanisms Congress chose to alleviate the "serious problems" it had identified.

---

[21] *Chicago Freight Car*, 83 NLRB 1163 (1949); *Daniel Hamm Drayage Co.*, supra. *Guy F. Atkinson Co.*, 90 NLRB 143 (1950). In *Daniel Hamm Drayage*, the Board specifically rejected the employer's claim that its reliance on the union-security and exclusive referral provisions of its prehire agreement with the union was justified by the "general custom and practice in the construction industry" by stating that "[t]he argument should properly be addressed to Congress and not this Board." 84 NLRB at 460.

In the body of Section 8(f) Congress expressly authorized the negotiation, adoption, and implementation of collective-bargaining agreements in the construction industry without initial reference to the union's actual majority status *and* expressly provided that such agreements could contain 7-day union-security clauses, exclusive hiring-hall referral procedures, and training and seniority requirements as hiring priorities. By so doing, Congress specifically sanctioned the established industry practices that the Board had previously found unlawful.

In legitimating these practices, however, Congress was mindful of employee free choice principles. In this regard, the second proviso to Section 8(f) declares that an 8(f) agreement "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." In that proviso, Congress sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires. In further protection of employee free choice, Congress made clear its intention that the limitations on coercive recognitional picketing contained in Section 8(b)(7)(C), also added to the Act by the 1959 amendments, should apply to unions seeking to obtain an 8(f) agreement, notwithstanding any representational status derived from an existing 8(f) agreement.[22]

Past consideration of 8(f)'s statutory language and legislative history has been brief. In *R. J. Smith,* the Board merely recited the aforementioned congressional language recognizing the contemporary contractual practice in the construction industry and the reasons for that practice.

---

[22]See H.Rep., 1 Leg. Hist. 946; 2 Leg. Hist. 1715 (remarks of Sen. Kennedy).

Then, after quoting Section 8(f) in full, the Board summarily identified the second proviso as the lynch pin [sic] to interpreting the entire section and concluded that the proviso must have meant that Congress intended to permit testing an 8(f) signatory union's majority status during a contract term either by election *or* by litigation of refusal to bargain charges.[23] In *Higdon,* supra, the Supreme Court focused narrowly on statutory language and legislative history supporting the view that a prehire agreement did not permit the coercion of employee free choice by unlimited picketing because an 8(f) union was not the "representative of an employer's employees" as that language is used in Section 8(b)(7)(C).

As current 8(f) law has evolved since *R. J. Smith* and *Higdon* on a case-by-case basis in various factual settings often not contemplated in the seminal cases, there has been no further significant attempt by the Board to reconcile it with Section 8(f)'s full text and entire legislative history. We find that this law now often operates in a manner that contradicts the apparent congressional intent. For example, current law views an 8(f) agreement as merely a nonbinding and unenforceable preliminary step to the ultimate establishment of a collective-bargaining agreement that can be recognized and enforced under the Act. There is no express language in the legislative history or the text of the Act declaring a congressional view that such collective-bargaining agreements, specifically authorized by the Act, are nonbinding, unenforceable, or subject to repudiation at will. Congress plainly mandated that 8(f) agreements be voluntary.[24] Yet, contrary to the assertion in

---

[23]*R. J. Smith,* supra at 694.

[24]See *Higdon,* supra at 346-347; *Operating Engineers Local 542 (R. S. Noonan),* 142 NLRB 1132, 1135 (1963), enfd. 331 F.2d 99 (3d Cir. 1964).

Ruttmann and *R. J. Smith,* it simply does not necessarily follow that because an 8(f) agreement can only be entered into voluntarily either party to the agreement is unfettered in its right "voluntarily" to repudiate the agreement. If the legislative history and statutory language discussed above indicate anything, it is an intent by Congress to legitimate and make enforceable the array of construction industry bargaining, referral, hiring, and employment practices that the Board had previously found to be unlawful, and thus unenforceable under the Act.[25]

In this regard, we believe that there has also been a critical distortion of the significance of the second proviso to Section 8(f) and its role in preserving employee free choice. It is clear that the proviso permits inquiry into a union's majority status during a contract term. There is, however, a significant distinction between permitting such an inquiry through the Board's representational processes—the mechanism expressly mentioned in the proviso—and permitting unilateral anticipatory repudiation of a collective-bargaining agreement prior to resolution of an inquiry in unfair labor practice proceedings. Because such a right of unilateral repudiation is so antithetical to traditional principles of collective-bargaining

---

[25]Congress' intent in the 1959 amendments to confer special *contractual* privileges upon construction industry employers and unions, as a result of that industry's unique bargaining and employment practices, is also reflected in Sec. 8(e) which, inter alia, authorizes the negotiation, adoption, and implementation of contract provisions relating to subcontracting in the construction industry that are enforceable under the Act, although such clauses would be unlawful outside the construction industry. See generally *Woelke & Romero Framing v. NLRB,* 456 U.S. 645 (1982). In *Higdon,* the Court expressly recognized certain basic parallels between Sec. 8(e) and 8(f). 434 U.S. 349 fn. 11.

under the Act, it seems likely that Congress would have expressly stated such a right if it intended to create one.[26]

A more defensible characterization of the second proviso is that it operates as an "escape hatch" for employees subject to unwanted representation imposed before they were hired. This characterization is consistent with the wording of the proviso itself in that its application presupposes the existence of an 8(f) agreement. The characterization is also supported by the legislative history. In the formational stages of an 8(f) relationship, when an employer is just beginning to draw on the "pool of . . . help centered about [the] appropriate craft union . . . [,]" Congress believed that "[i]f the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees actually hired." S.Rep., 2 Leg. Hist. 424. Congress was concerned, however, about employees' ability to rid themselves of an existing representative, or select an alternate one, once the 8(f) relationship was fully established. Thus, Congress specified that an 8(f) agreement may not act as a bar to, inter alia, decertification or rival union petitions.[27]

Although the aforementioned legislative history indicates certain assumptions about a union's ability to achieve majority support after executing an 8(f) agreement, the legislative history and statutory language are devoid of

---

[26]We note that Congress has recently expressed its preference against the anticipatory unilateral repudiation of collective-bargaining agreements by bankrupt employers in passing the 1984 Bankruptcy Code Amendments, which effectively overruled the Supreme Court's holding permitting repudiation in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

[27]See H.Rep., 2 Leg. Hist. 808; S.Rep., 1 Leg. Hist. 452; Senate Committee Analysis, 1 Leg. Hist. 947, 967.

any indication that Congress contemplated the extraordinary "conversion" of such nonbinding relationships into full-fledged, wholly enforceable 9(a) relationships constituting an absolute bar to employees' efforts to reject or to change their collective-bargaining representative. In our view, this particular aspect of the conversion doctrine contravenes Congress' intent to provide employees with a meaningful and readily available escape hatch.

Finally, the current 8(f) unit determination rules likewise fail to reflect the objectives Congress expressed in enacting Section 8(f). First, current law draws a sharp distinction between "permanent and stable" and "project by project" work forces.[28] Yet, Congress described the construction industry generally as one that hires employees on a project-by-project basis. That very characteristic was one of the underlying reasons for Section 8(f)'s enactment.[29] The Board's artificial bifurcation of the industry along these lines, therefore, seems plainly contrary to Congress' expressed view of the industry. Second, to the extent current law applies the merger doctrine to section 8(f), and thereby renders practically insignificant the representational desires of a single employer's employees in multiemployer associations, it places an additional obstacle in the way of employees who wish to reject or change their collective-bargaining representative.[30]

---

[28]See generally *Dee Cee Floor Covering*, supra; *Construction Erectors*, supra; *Giordano Construction Co.*, supra.

[29]This characteristic of the industry still exists today. Indeed, at oral argument several of the representstives, both management and labor, stated that the Board's distinction is unjustified and fails to comport with the industry's realities.

[30]The views of the current Board may differ over the applicability of the "merger doctrine" outside the construction industry. See *Gibbs &*

(Continued on next page)

Employee Free Choice and Labor Relations Stability

Two of the overarching objectives of the National Labor Relations Act are the promotion and protection of employee free choice and labor relations stability. The specific legislative history of Section 8(f) reflects these same general objectives. Accordingly, the current Board law must be measured by the degree to which it achieves an appropriate balance between the dual congressional objectives of promoting and maintaining employee free choice principles and labor relations stability in the construction industry.

As noted above, *R. J. Smith* is the foundation for current law that an 8(f) agreement is unenforceable under the Act and subject to unilateral repudiation at any time, for any reason. In that decision, the Board sought to predicate its holding on employee free choice principles by stating:

> Inasmuch as Congress clearly intended to permit a test, by petition, of majority status and unit appropriateness at any time during the contract, it would be anomalous, indeed, to hold that Section 8(f) prohibits

---

(Continued)

Cox, Inc., 280 NLRB No. 110 (June 24, 1986). However, merger principles are clearly inappropriate in light of our interpretation of Sec. 8(f) which holds that an 8(f) union enjoys no irrebuttable presumption of majority status and Congress' declaration in the second proviso that an 8(f) union's representational authority is subject to challenge despite the existence of a collective-bargaining agreement or an established bargaining history. Thus, while we may disagree on the issue of whether a nonconstruction industry employer and union can act together to merge a single unit into a larger one, we can all agree that a construction industry employer and union cannot, by merging the single employer unit into a multiemployer one, act to effectively preclude a single employer's employees from challenging their 8(f) union's representational authority.

examination of those questions in the litigation of refusal-to-bargain charges.

191 NLRB at 694.

In our view, that pivotal argument in *R. J. Smith* is simply wrong. A rule granting unilateral repudiation rights to an employer who voluntarily enters into a collective-bargaining agreement is not a necessary predicate for advancement of the employee free choice principles embodied in the second proviso. In the context of traditional 9(a) agreements, for example, the Board effectuates employee free choice by limiting the election bar effect of a contract to 3 years, but the irrebuttable presumption of a union's majority status and the enforceability of the contract exist and continue for the contract's full term. In addition, under current 8(f) law, an employer's decision to repudiate may be based on the employer's own economic considerations, without reference to or concern for the employees' desire to continue the status quo. Even if the employer has a legitimate question as to its employees' representational desires, Congress has expressly provided an electoral mechanism for testing them. Accordingly, in our view, it is more anomalous to hold, as in *R. J. Smith*, that a proviso enacted to preserve employees' rights to choose, change, or reject their own collective-bargaining representative can serve as a basis for an employer unilaterally to repudiate a voluntary collective-bargaining agreement for any reason it chooses.[31]

---

[31]We agree with our concurring colleague that *R. J. Smith* is essentially flawed in that it fails to take into account the unique aspects of an 8(f) contract. Since Congress specifically provided that majority status is not a prerequisite to signing an 8(f) agreement, it is unlikely that Congress intended that the mere assertion of a lack of majority status would be a defense to a refusal to maintain such an agreement. It simply does

(Continued on next page)

On the other hand, we view the current postconversion rules as equally inconsistent with employee free choice principles because those rules are too absolute in protecting the union's representative status. As we have noted, conversion can occur "within a matter of days" of the parties' signing an 8(f) agreement,[32] and, if there is an existing employee complement, conversion can be "immediate" upon the contract's signing.[33] Because that conversion creates an irrebuttable majority presumption during the contract term,[34] any election petition is barred by operation of the Board's contract-bar rules.[35] Accordingly, by allowing almost instantaneous conversions with an accompanying contract bar, the conversion doctrine effectively renders the second proviso nugatory. Such rules hardly advance the objective of employee free choice.[36]

The Board's decision in *R. J. Smith* and its conversion doctrine fare no better when measured against the congressional objective of fostering labor relations stability in the construction industry. First, it is obvious that a rule that

---

(Continued)

not follow that because Congress made agreements in the construction industry easier to obtain, it intended them to be voidable at will. Rather, it appears to us that the Congress specified in the proviso the means by which a party might withdraw from the contract; i.e. through the Board's election processes.

[32]*Pacific Intercom*, 255 NLRB 184, 191 (1981).

[33]*Wheeler Construction Co.*, 219 NLRB 541, 542 (1975); Cf. *Carrothers Construction Co.*, supra at fn. 1.

[34]*Hageman Underground Construction*, supra at 62.

[35]Cf. *Albuquerque Insulation Contractor, Inc.*, 256 NLRB 61, 63 fn. 5 (1981).

[36]Employee free choice is further diminished when the merger doctrine is applied to render irrelevant the representational desires of single employer unit employees.

sanctions unilateral contract repudiation and the inevitable disruptions that result is not conducive to labor relations stability. The Board in *R. J. Smith* did not even allude to such potential for disruptions, nor did it attempt to reconcile this potential with Congress' desire in enacting 8(f) for preserving contracts in the construction industry. Indeed, although we now view *R. J. Smith* and its progeny as a failed attempt to effectuate free choice, we also find that this attempt unnecessarily deemphasized stability in the industry.

Beyond *R. J. Smith*, however, the Board's conversion doctrine fails to foster industry stability in another important way. An effective conversion can take place, without notice, at virtually any time after the signing of an 8(f) agreement, but it may take years of fractious litigation to establish whether conversion actually did occur and, if so, what unit of employees was involved. Therefore, neither the parties to the agreement nor the employees working under it can know with any degree of certainty what their respective rights and obligations are at any given time. Rules that create such a state of doubt and promote adversarial proceedings as a way to resolve that doubt do nothing to effectuate the statutory policy of labor relations stability.

The Current Law's Practical Problems

The Board's current interpretation and application of Section 8(f) also give rise to serious practical problems with the reliability and relevance of evidence purporting to establish majority status and with the protraction of litigation. In this regard, the conversion doctrine often requires the Board to "look back" any number of years into a relationship characterized by sporadic and shifting

employment patterns to determine whether the union, at any time, enjoyed majority support. This determination must be made in adversarial litigation based on such factors as union membership rolls, the presence of an enforced union-security clause, exclusive hiring hall referrals, or union fringe benefit contribution records. The documentary evidence of such factors is often incomplete, contradictory, or unavailable. In those situations, the crucial determination may be made on the basis of individual recollections as to employees' representational wishes years previously.[37]

In addition, there remains a significant question as to whether the presence of these evidentiary factors, individually or collectively, in the context of an 8(f) bargaining relationship, justifies a finding of majority support sufficient to make Section 9(a) fully applicable. As for union membership, "[i]t is well established that union membership is not always an accurate barometer of union support." *Authorized Air Conditioning Co. v. NLRB,* 606 F.2d 899, 906 (9th Cir. 1979). The converse is also true in that the absence of union membership does not necessarily indicate a desire *not* to be represented by a union in

---

[37]These practical difficulties are compounded when unit determination questions arise because even before a determination of whether conversion occurred can take place, the parties must litigate, and the Board must decide, whether the work force is permanent and stable or project by project. The difficulties are illustrated by *Construction Erectors,* 265 NLRB 786 (1982). There, grappling with "a myriad of exhibits," the Board eventually determined that an employer who hired 47 individuals over an 11-month period in monthly numbers ranging from 5 to 30 employed a permanent and stable work force based primarily on evidence that 15 employees worked for 7 or more of the 11 months. We cite these facts not in an effort to demonstrate that the Board's decision was "wrong" but rather to illustrate the complex and protracted nature of the litigation required to resolve what is only a "preliminary issue" under the conversion doctrine.

collective-bargaining. See, e.g., *John Ascuaga's Nugget*, 230 NLRB 275 fn. 1 (1977). Regarding union-security clauses, at least one court has held that membership pursuant to a union-security clause is insufficient to convert an 8(f) relationship to full 9(a) status. *Precision Striping v. NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981) ("A union security clause operates 'to compel new employees to join the union' because union membership is the price for obtaining a job.") As for hiring hall referrals or fringe benefit contributions, the former may mean little because referrals cannot lawfully be predicated on union preferences, and the latter demonstrates only some degree of compliance with a benefits provision in the agreement. In short, the majority status finding that is a necessary predicate for conversion often is based on a highly questionable factual foundation.[38]

In summary, we conclude that the Board's 8(f) law, as it currently operates, does not comport fully with Section 8(f)'s text and legislative history, is not the best way to advance employee free choice and labor relations stability in the construction industry, and entails evidentiary determinations that are inexact, impractical, and generally insufficient to support the conclusions they purport to demonstrate. Accordingly, we overrule *R. J. Smith, Dee Cee Floor Covering, Authorized Air Conditioning,* and their progeny to the extent inconsistent with this decision, and we shall no longer apply the so-called conversion doctrine to 8(f) cases.

---

[38]The practical problems and infirmities of the conversion doctrine are also present in representational cases that arise under Sec. 8(f). This is so because before an election petition can be processed, it must be determined whether conversion has occurred. If it has, any existing contract will bar the petition. See, e.g., *Giordano Construction*, 256 NLRB 47 (1981).

Suggested Alternatives to the Conversion Doctrine

Before discussing the principles we have adopted, it is helpful to establish the other major options considered and to explain why we find such options inappropriate. At oral argument and in the briefs, two broad alternatives to the conversion doctrine were advanced. The first alternative would provide that an 8(f) representative can never possess or acquire any majoritarian rights absent Board certification or voluntary recognition pursuant to Section 9(a). This view would retain the *R. J. Smith* holding that an 8(f) agreement is unenforceable but would reject the conversion doctrine by providing for the achievement of 9(a) status only through traditional 9(a) processes.

The second alternative would provide that Section 8(f) represents an "alternative means" for a construction industry employer and union to establish the functional and legal equivalent of certification or 9(a) recognition subject only to Section 8(f)'s second proviso that the agreement cannot act as a bar to an election petition. The signatory union would enjoy immediate and complete 9(a) status (subject to the proviso) including a rebuttable presumption of majority status upon the contract's expiration.

We find the first proposed alternative to be clearly inappropriate. First, to the extent this view relies on *R. J. Smith,* the reasons we have already advanced for overruling that decision would apply at least equally to this option. Indeed, because more construction industry agreements would be unenforceable and subject to unilateral repudiation, the potential disruptive effects of this rule would be even greater than under current law. Second, this view ignores the fact that one of the explicit reasons Congress cited for enacting 8(f) was its determination that

"representation elections in a large segment of the [construction] industry are not feasible." S.Rep., 1 Leg. Hist. 451-452. We would nevertheless be required to hold that while Congress enacted Section 8(f) specifically to bring the construction industry within the coverage of the Act despite electoral difficulties, Congress fashioned a mechanism through which only a small segment of the industry's employees could actually enjoy meaningful collective-bargaining representation under the Act. We are unwilling to ascribe such an intent to Congress. Third, this option, which provides that 9(a) status never attaches to an 8(f) agreement, renders the second proviso superfluous. If the body of Section 8(f) means that an 8(f) agreement can never acquire 9(a) status, there is no need for the proviso because, by definition, the agreement can never possess bar qualities.

The "alternative means" approach is admittedly closer to the principles we have today concluded to adopt. Nevertheless, we are unable to embrace this approach. If, as this alternative contends, a union acquires full 9(a) status based solely on the employer's adoption of an 8(f) agreement, the union should also acquire the full rights and privileges of an exclusive bargaining representative. In that event, the signatory union would enjoy a rebuttable majority presumption upon the contract's expiration and could lawfully seek to compel the employer, through strikes or picketing, to negotiate and sign a successor agreement. This would be directly contrary to the express congressional mandate that an employer cannot be coerced, through strikes or picketing, into negotiating or adopting

an 8(f) agreement.[39] This mandate was expressly recognized and applied in *Operating Engineers Local 542 (R. S. Noonan),* supra, and we discern no legitimate basis for departing from that holding or declining to apply it to "successor 8(f) agreements."

Having demonstrated that the two "extreme" proposed alternatives to the conversion doctrine are inadequate, we can advance to discussion of the principles we deem appropriate. Not surprisingly, our approach lies between the two extremes.

The Appropriateness of the New Rules and Procedures

We recognize that our decision today cannot simply rest on our determination that the Board's existing 8(f) rules and two of the proposed alternatives are inappropriate and ineffective. Although "an administrative agency is not disqualified from changing its mind," *Higdon,* supra at 351, we are not free to adopt and apply principles that are "fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." *American Ship Building v. NLRB,* 380 U.S. 300, 318 (1965). Rather, the principles we advance must demonstrably strike a more appropriate balance between the legitimate and often conflicting congressionally expressed policies embodied in Section 8(f) and the Act as a whole.[40]

---

[39]The Conference Report on the 1959 amendments, see 2 Leg. Hist. 934, 946, states that "[n]othing in [Section 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such [8(f)] agreements."

[40]"The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB v. Truckdrivers Union,* 353 U.S. 87, 96 (1957). In this regard, we wish to emphasize the nature of the exercise in

(Continued on next page)

Taken together, the four basic principles we advance today provide an overall framework for the interpretation and application of Section 8(f) which will enable parties to 8(f) agreements and employees to know their respective rights, privileges, and obligations at all stages in their relationship. When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative.[41] Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e). In determining the appropriate unit for election purposes the Board will no longer distinguish between "permanent and stable" and "project

---

(Continued)

which we engage here. We have not merely parsed the case precedent and legislative history in order to arrive at yet another "tenable" construction of the statutory language. Rather, consistent with our mission as the administrative agency responsible for enforcing the NLRA, we have applied our cumulative individual and institutional experience and expertise toward achieving, consistent with our reading of the statutory language and our interpretation of the legislative intent, what we perceive to be a better application of the statute. Given the present state of the law in this area, we see no alternative but to exercise our prerogative to do so. Admittedly, we have not been able in this one decision to anticipate every ramification of the principles we announce today. Nor do we deem it wise to attempt to do so, since we hope to be afforded the latitude to employ, as we have in the past, the fine crucible of case-by-case experience in which to test and refine these principles, and which the administrative process itself makes possible.

[41]In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it.

by project" work forces, and single employer units will normally be appropriate.[42]

In the event of an election, a vote in favor of the signatory union, or a rival union, will result in that union's certification and the full panoply of Section 9 rights and obligations. A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship. In that event, the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period. The purpose of this general prohibition is to preclude an employer and a union both from ignoring the electorally expressed preference of a majority of unit

---

[42]Accordingly, these rules reject the so-called merger doctrine's application to 8(f) cases. Assuming that the merger doctrine fosters a certain amount of stability in labor relations, we believe that in the construction industry the cost of achieving that stability in terms of employee free choice is too high. As we have explained, in this industry the merger doctrine can operate to bind a single employer and its employees to full 9(a) status without providing the employees any opportunity to express their representational preferences because Sec. 8(f) eliminates majority status as a prerequisite for signing a contract. On balance, therefore, we find that the overall objectives of the Act will be better served by abandonment of the merger doctrine in these circumstances. In so doing, we do not imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry. Rather, we hold that the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association.

Specific representation case matters are beyond the scope of this opinion. Generally, we intend to apply existing eligibility and election rules to the extent feasible. We do note, however that we will not require that an RM petition be supported by traditional "objective considerations." Instead, an RM petitioner will need only demonstrate that it is signatory to an 8(f) agreement to satisfy the "objective considerations" requirement.

employees and from maintaining an 8(f) relationship during a period when the Act precludes holding another election, the availability of which is the sine qua non safeguard to permitting and enforcing an 8(f) contract.[43] Failure to terminate the 8(f) relationship or its premature reestablishment after an election will subject the parties to 8(a)(2) and 8(b)(1)(A) liability.[44]

Even absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship. The signatory employer will be free, at all times, from any coercive union efforts, including strikes and picketing, to compel the negotiation and/or adoption of a successor agreement.

The new principles give substantive effect to Section 8(f)'s legislative history and textual framework by allowing construction industry employers and unions to establish a meaningful and enforceable contractual relationship that is consistent with established industry practices and needs. At the same time, employees are assured the constant availability of an electoral mechanism for expressing their

---

[43]Sec. 9(c)(3) provides, in relevant part: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

[44]Sec. 8(f) accords immunity from unfair labor practice charges to construction industry employers and unions who contract before the union's majority status has been established under Sec. 9(a). Read in light of the legislative history, discussed infra, which generally contemplated that 8(f) unions would subsequently achieve majority status, we do not view the immunity from unfair labor practice liability as extending to parties who maintain or enter an 8(f) relationship after a majority preference against union representation has been clearly established in a Board election.

Even after a union's electoral loss, it remains free at all times to seek to establish a 9(a) majority-based relationship with an employer through other, traditional means.

representational desires. Accordingly, to a much greater degree than the law we abandon, the new interpretation fully squares with Section 8(f)'s text and legislative history.[45]

These principles will provide greater stability in the industry by precluding parties from unilaterally repudiating their voluntary agreements.[46] In addition, parties and employees will be aware of their respective rights, privileges, and obligations at all times during the relationship and changes in the relationship will occur only in an orderly, nonadversarial context that is not dependent on protracted and complex litigation.

Employee free choice will be enhanced most directly by the resuscitation of 8(f)'s second proviso. By giving full force and effect to the second proviso and, at the same time, precluding the contract parties from acting solely in

---

[45]Our rule that an 8(f) contract can only be "repudiated" through the Board's election processes is not undermined by Congress' view that Sec. 8(f) was necessary, in part, because of difficulties in conducting the Board elections in the construction industry. First, Congress' concerns focused mainly on the "pre-hire" stages of an 8(f) relationship when hiring had not taken place or had just begun. Our rules invoke the election processes only after the relationship has been established and is operational. Second, since 1959 the Board has gained substantial expertise and developed detailed procedures for conducting elections in the construction industry. See, e.g., *Daniel Construction Co.*, 133 NLRB 264 (1963). In more general terms, the Board is not inexperienced in developing election rules and procedures to accommodate short-term and sporadic employment patterns. See, e.g., *American Zoetrope Productions*, 207 NLRB 621 (1973).

[46]We are not unmindful that one of the effects of this decision may be to encourage increased resort to the Board's electoral processes and thus, in a sense, to foster in the short term an added degree of dislocation in the industry. Our view, however, is that the long term effect will ultimately be a stablizing one, and that the great majority of those collective- bargaining relationships which have contributed to stability in the industry will be undisturbed or confirmed.

their own interest to force continued compliance with or abandonment of the agreement, the principles will operate to assure that employees will not be deprived of their collectively bargained rights (via unilateral contract repudiation) *or* be forced to continue working under the regimen of a union that they would prefer to reject or change.[47]

Our new analytic framework also better fulfills general statutory policies and integrates Section 8(f) with other sections in the Act. In this regard, the policy of labor relations stability in the Act generally favors requiring parties to adhere to a voluntarily adopted collective-bargaining agreement. It is also consistent with the Act generally to limit the extent to which an employer may rely on its perception of its employees' representational wishes in an effort to abrogate its lawful contractual obligations.[48] In

---

[47]By giving full force and effect to the second proviso, our rules should reduce the dangers of "top down" organizing warned against in *Higdon*, 434 U.S. at 346-347. Thus unlike the conversion doctrine, these rules will serve to prevent the "locking in" of employees either by means of "instant conversion" or application of the "merger doctrine."

Where an employer has a legitimate basis for questioning the union's status, it is free to petition the Board for relief, and its petition can be predicated simply upon the fact that it is signatory to an 8(f) agreement. See fn. 42 supra. In addition, once the contract expires, the employer can lawfully refuse to negotiate or adopt a successor agreement.

[48]Outside the construction industry, an employer cannot lawfully withdraw recognition from an incumbent union unless it can demonstrate an actual loss of majority status or sufficient objective considerations to establish a reasonable good-faith doubt as to the union's majority status. *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970). Even if an employer can meet that burden, however, it cannot withdraw recognition during the term of a valid collective-bargaining agreement. *Hexton Furniture Co.*, 111 NLRB 342 (1955).

addition, our action conforms to the Act's general preference for resolving representational questions in the more expeditious, nonadversarial representation case format.

The most difficult question confronting us in modifying the law of 8(f) relationships, however, concerns the degree to which the principles of Sections 8(a)(5), 8(b)(3), 8(d), and 9(a) apply. It is clear that the imposition of enforceable contract obligations on signatories to an 8(f) agreement is contingent, in part, on the signatory union possessing exclusive representative status.[49] In this regard, we have already stated in our rejection of one proposed alternative to the conversion doctrine that a rule vesting an 8(f) union with full and immediate 9(a) status is inappropriate. See, pp. 28-29, supra. In our view, however, it is both reasonable and desirable to adopt a rule that constitutes a *limited* application of Section 8(a)(5)'s contract enforcement mechanisms by virtue of the strictly limited 9(a) representative status that we believe a 8(f) signatory union necessarily possesses.[50]

---

[49]This is so because 8(a)(5) obligations are expressly subject to the provisions of Sec. 9(a). Thus Sec. 8(a)(5) declares that "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*" (Emphasis added.) Sec. 9(a) provides in pertinent part that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining. . . . "

[50]Although there has been considerable controversy over the enforceable nature of an 8(f) union's contract *rights* on the basis of exclusive 9(a) representative status, we are aware of no similar doubt about the enforceable nature of an 8(f) union's *duty* of fair representation, a duty derived from exclusive 9(a) representative status. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

In reaching this conclusion, we note first that the obligations we impose on an 8(f) employer through our application of Section 8(a)(5) to 8(f) agreements are limited to prohibiting the unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative. Importantly, this limited obligation is not imposed on unwitting employers. Rather, it is a reasonable quid pro quo that is imposed only when an employer voluntarily recognizes the union, enters into a collective-bargaining agreement, and then sets about enjoying the benefits and assuming the obligations of the agreement.[51]

The enforceable Section 9(a) status we confer on signatory unions is also only coextensive with the bargaining

---

[51]The importance of recognizing the limited but fundamental quid pro quo nature of an 8(f) relationship merits reiterating Congress' view that:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. . . . One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. S. Rep., 1 Leg. Hist. 424.

agreement which is the source of its exclusive representational authority.[52] Beyond the operative term of the contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative. Unlike a full 9(a) representative, the 8(f) union enjoys no presumption of majority status on the contract's expiration and cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement. At no time does it enjoy a presumption of majority status, rebuttable or otherwise, and its status as the employees' representative is subject to challenge at any time.[53]

It is our belief that Congress intended, and the structure of Section 8(f) contemplates, this limited linkage between Section 8(a)(5) and Section 9(a). As we have shown, Congress was prompted to enact Section 8(f) in large part because the Board had declared unlawful many of the labor relations practices that are both traditional and necessary in the construction industry. The centerpiece of these practices was the negotiation and adoption of prehire collective-bargaining agreements that normally contained union-security clauses, exclusive referral provisions, and

---

[52]A rule conferring limited representational status on an 8(f) union does not present the dangers such a rule would create outside the construction industry. After all, an 8(f) union is not a stranger to the employees. Rather, it is usually the initial employment referral source for most of the employees the employer hires. See fn. 51, supra. In any event, if the employees subsequently decide to reject that representative, the contract will not stand in their way.

[53]We do not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority. *Island Construction Co.*, 135 NLRB 13 (1962). That is, nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.

seniority and training hiring priorities. Congress amended the Act so as to sanction these agreements and thereby bring the industry within the overall scope of the Act. And, while Congress did not declare in the body of Section 8(f) the extent to which this action has an impact on Section 9(a), it did give what is, to us, a rather clear indication of the impact it intended in the second proviso. Thus, the second proviso explicitly makes Section 9 applicable by stating that 8(f) agreements cannot act as a bar to petitions aimed at, inter alia, decertifying or changing the employees' collective-bargaining representative. To us, it is reasonable to conclude that the applicability of Section 9(c) and (e) requires the applicability of Section 9(a). Phrased otherwise, if a contract authorized by Section 8(f), complete with a union-security clause and exclusive referral provision, does not carry with it any indicia of 9(a) status, there is absolutely no need to make applicable the procedures for decertification of the signatory union.

In short, we find that the linking of Section 8(a)(5) and Section 9(a), for the limited purpose only of enforcing an 8(f) agreement unless employees vote to reject or change their representative, is not only consistent with the Act but is the interpretation and application of Section 8(f) that gives the most meaning and substance to that section's text and legislative history. We now find ourselves in fundamental agreement with the common-sensical pre-*Higdon* view expressed by the District of Columbia Circuit, in denying enforcement to *R. J. Smith* (480 F.2d 1186), that Congress intended to permit 8(f) bargaining representatives to enforce their contracts through Section 8(a)(5).[54]

---

[54]Similarly, although expressly reserving from deciding the issue, the Third Circuit stated in a pre-*Higdon* opinion that "Nothing in either the text or the legislative history of § 8(f) suggests that it was intended to

(Continued on next page)

Further, the decision we announce today is consistent with the principles that the Court identified as fundamental to Section 8(f) in its decisions in *Higdon* and *McNeff v. Todd*, 461 U.S. 260 (1983). In this regard, neither case specifically passed on the validity of the Board's conversion doctrine. *Higdon* affirmed the Board's view that a union violates Section 8(b)(7)(C) by picketing an employer to compel compliance with an 8(f) agreement and *McNeff* held that an 8(f) agreement is enforceable under Section 301 until it is lawfully repudiated.[55] However, to the extent those cases addressed that part of the Board's interpretation of Section 8(f) rejected here, the Court found that the previous interpretation was "acceptable" yet "perhaps not the only tenable one." *Higdon*, 434 U.S. at 341.[56]

(Continued)

leave construction industry employers free to repudiate contracts at will." *NLRB v. Irvin-McKelvy Co.*, 475 F.2d 1265, 1271 (3d Cir. 1973).

[55]In *Higdon* the D.C. Circuit had denied enforcement of the Board's Order based on its previous rejection of the Board's decision in *R. J. Smith*. In accepting the Board's interpretation of Sec. 8(f) the *Higdon* Court did not directly address or specifically reject the D. C. Circuit's view that 8(f) contracts are enforceable through Sec. 8(a)(5). Rather, the Court held only that the court of appeals erred by failing to accord the Board's interpretation appropriate deference.

Although the Court's opinion in *McNeff* states the applicable rules of law about voidability of 8(f) agreements in more absolute terms, we view this statement as nothing more than a reiteration of current law, which remained "acceptable" but "perhaps not the only tenable" view. If anything, the express holding in *McNeff* indicated limits on the extent to which the *R. J. Smith/Higdon* interpretation of the Act was even "acceptable."

[56]We recognize that our decision today casts considerable doubt on the Board's continued adherence to the 8(b)(7) holding, based on *R. J. Smith*, which the Supreme Court in *Higdon* found "acceptable" and upheld. To a certain extent, this holding has already been limited by the implication in *McNeff* that a union may lawfully picket to protest an employer's noncompliance with obligations that have already accrued under the 8(f) contract. See also *Operating Engineers Local 150 (Tri-*

(Continued on next page)

In finding the then-current view "acceptable" the Court identified Congress' objectives in enacting Section 8(f) as an attempt to lend stability to the construction industry while fully protecting employee free choice principles. To the extent this decision better achieves those objectives, it can draw substantial support from *Higdon* and *McNeff*. Our decision also restores full and meaningful effect to the second proviso which the Court views as fundamental to the entire 8(f) scheme. See *Higdon*, 434 U.S. at 345-346; *McNeff*, 461 U.S. at 268.[57]

Concededly, there are certain tensions between our action and certain language in *Higdon* and *McNeff*. Both

---

(Continued)

City Excavating), 255 NLRB 597 (1981). The general rule of Board law is that picketing to enforce a collective-bargaining agreement does not constitute picketing to force "initial acceptance" of the union, so that the strictures of 8(b)(7) do not apply. *Building & Construction Trades Council of Santa Barbara County (Sullivan Electric Co.)*, 146 NLRB 1086 (1964), and *Bay Counties District Council of Carpenters (Disney Roofing & Material Co.)*, 154 NLRB 1598 (1965), enfd. 382 F.2d 593 (9th Cir. 1967). If the Board is directly presented in a future case with the issue of whether a union's picketing to compel compliance with a now-enforceable 8(f) agreement violates 8(b)(7), we will decide whether there are any policy considerations apart from the rejected *R. J. Smith* rationale warranting an exception to the general rule that unions may picket to enforce compliance with collective-bargaining obligations.

[57]Indeed, there is arguably a specific parallel between our decision today and the Court's holding in *McNeff*. In *McNeff*, the Court held that obligations under an 8(f) agreement are fully enforceable under Sec. 301 without reference to the union's majority status until a specific event occurs, i.e., repudiation. The Court specifically declined to define what actions constitute repudiation. Under our interpretation of Sec. 8(f), the 8(f) agreement is similarly fully enforceable under Sec. 8(a)(5) without reference to the union's majority status until a specific event occurs, i.e., an election in which the employees choose to reject or change their bargaining representative. In our view, it is only after this particular type of "repudiation" that rejection of the agreement is not only appropriate, but required.

cases declare that an 8(f) union does not possess exclusive 9(a) representational status[58] and *Higdon* indicates that Section 8(f) does not act to expand an employer's 8(a)(5) obligations.[59] As we set forth above, however, our decision does not vest an 8(f) signatory union with the complete rights and privileges of a 9(a) representative, and it does not expand an employer's 8(a)(5) obligations beyond those that we believe Congress necessarily contemplated in enacting Section 8(f). In particular, an 8(f) employer has no 8(a)(5) obligations after expiration of the agreement underlying a union's claim of representative status.

Finally, we believe that both *Higdon* and *McNeff* must be read in the context of the Board's then current efforts to balance the multiple legitimate conflicting interests present in Section 8(f). The Board decision reviewed in *Higdon* issued in 1975 (216 NLRB 45) when the conversion doctrine was not yet 4 years old. Since that time, the doctrine has evolved and expanded into a substantially different and more complex set of rules and procedures than existed in 1975. Over the past 12 years, the Board has experienced, first hand, the application of its rules in a multitude of circumstances and we have been able to evaluate the extent to which those rules serve their objectives. As we have shown, the balances struck by the old law have become skewed and often operate at cross-purposes. In this regard:

> "Cumulative experience" begets understanding and insights by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more

---

[58]See *Higdon*, 434 U.S. at 346; *McNeff*, 461 U.S. at 268.
[59]See *Higdon*, 434 U.S. at 346.

than anything else the administrative from the judicial process.

NLRB v. Seven Up Bottling Co., 344 U.S. 344, 349 (1943). In short, our experience has convinced us that the current law simply fails to achieve the objectives for which it was created. It is our conviction that the principles we advance today will correct the flaws that have become evident and better achieve the objectives Congress has set.

The final issue we confront is whether the foregoing principles should be applied retroactively. The Board's usual practice is to apply new policies and standards "to all pending cases in whatever stage." *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958). Under *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by balancing any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[60] Such a balancing test applied here leads to the conclusion that the Board's usual practice of retroactive application is appropriate.

Although some may contend that the new law announced today represents a sharp departure from past precedent, it was the unsettled and confusing nature of that precedent which necessitated this change. Indeed, the parties and amici at oral argument were generally united in the desire for changes in existing 8(f) law. The infirmities and uncertainties in current law also make it less likely

---

[60]See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *NLRB v. Niagara Machine*, 746 F.2d 143, 151 (2d Cir. 1984); *Electrical Workers Local 900 v.NLRB*, 727 F.2d 1184 (D.C. Cir. 1984); *Synalloy Corp.*, 239 NLRB 637, 638 (1978) (dissenting opinion of former Member Penello).

that a party such as the Respondent here could knowingly have acted in reliance on that law in order to avoid liability.[61] Application of the Board's new 8(f) principles here and in all pending cases will undoubtedly impose on some parties certain obligations and liabilities they would not have incurred under existing law. At most, however, any additional burden imposed must be borne only for the duration of the contract involved.

Countervailing interests justify this additional burden. First, the Board is doing nothing more than holding parties to the terms and conditions of 8(f) contracts which were voluntarily entered into. Second, as extensively discussed above, the need to serve better the fundamental statutory policies of employee free choice and labor relations stability compels our actions here. Finally, if we were to apply

---

[61]Consequently, the circumstances here are different from those in *Dresser Industries*, 264 NLRB 1088, 1089 (1982), where the Board applied a new standard prospectively and dismissed the complaint against a respondent employer for withdrawing from bargaining with an incumbent union after the filing of a decertification petition. Had the respondent not withdrawn from bargaining, in reliance on existing precedent, its conduct actually would have been unlawful under that precedent.

Some employers probably have relied on *R. J. Smith* as a means of repudiating a prehire agreement. However, that reliance interest is not a particularly strong one in light of the purposes which Congress sought to achieve under Sec. 8(f). The interest which is entitled to protection is the ability of an employer to avail itself of the Board processes to determine whether there is continued majority support to undergird the union and the agreement. The new rule, which affirms the Board's election procedures for resolving that issue, does not seriously detract from what an employer should appropriately expect in the way of protection under the old rule.

Member Stephens believes that the rule announced today does represent an "abrupt" departure from past precedent, especially in light of the Supreme Court's tacit approval of *R. J. Smith* in *Higdon*. However, for the foregoing reasons, he agrees that retroactive application is permissible.

the new 8(f) law prospectively only, we would then be required for an indefinite period of time to perpetuate the administrative and litigational difficulties entailed in application of arcane current law to all pending 8(f) cases.

In sum, we conclude that the statutory benefits from the announced changes in 8(f) law for employees, employers and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes. Consequently, we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage.

Applying these new principles to this case, we find that the Respondent violated Section 8(a)(5) and (1) by repudiating the 1982-1985 contract with the Union and withdrawing recognition during the contract's term. The Respondent voluntarily entered into an 8(f) relationship with the Union and signed the contract. This contract was binding, enforceable, and not subject to unilateral repudiation by the Respondent.[62] Because the contract has expired, however, the Union enjoys no continuing presumption of majority status, and the Respondent is not compelled to negotiate or adopt a successor agreement based solely on the existence of an 8(f) relationship. In addition, the Union is not entitled to engage in any coercive conduct, including strikes and picketing, to force the Respondent to execute a successor 8(f) agreement.

---

[62]Accordingly, the Respondent's defense that it employed no ironworkers when it repudiated the contract is without merit. An 8(f) contract is enforceable throughout its term, although at a given time there may not be any employees to which the contract would apply.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By repudiating its 1982-1985 collective-bargaining agreement with the Union and withdrawing recognition from the Union prior to the expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make whole, as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), any employees for losses they may have suffered as a result of the Respondent's failure to adhere to the contract since 21 September 1983, with interest, as computed in *Florida Steel Corp.,* 231 NLRB 651 (1977).[63]

---

[63]Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, the interest owed with

(Continued on next page)

In view of our rules set forth above, we shall not extend the make-whole remedy beyond the expiration date of the 1982-1985 contract. The Respondent would have been privileged to announce an intention not to bargain with the Union for a new contract, and it was only obligated to adhere to the old contract until its expiration date. Further, the Respondent would have been Privileged to withdraw recognition from the Union and implement unilateral changes upon the expiration of the contract on 31 May 1985.[64]

ORDER

The National Labor Relations Board orders that the Respondent, John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a John Deklewa & Sons and/or John Deklewa & Sons, Inc., Bridgeville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement from International Association of Bridge, Structural and Ornamental Iron Workers,

---

(Continued)

respect to the health and welfare fund and pension plan shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Our make-whole remedy includes the requirement that the Respondent remit to the Union all dues and fees it should have deducted from employees' wages and remitted pursuant to the terms of the collective-bargaining agreement.

[64]Compare *Burger Pits, Inc.*, 273 NLRB 1001 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 19 v. NLRB*, 785 F.2d 796 (9th Cir. 1986), where even though an employer unlawfully withdrew recognition from a union during midterm of a 9(a) contract, the Board tolled the backpay liability at contract expiration because the employer had a reasonable, good-faith doubt of the union's majority status.

Local 3, AFL-CIO, as the exclusive collective-bargaining representative of the Respondent's employees covered by the agreement.

(b) Refusing to adhere to, until the 31 May 1985 expiration date, its 1982-1985 collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the Policies of the Act.

(a) Make whole the above-described employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract until it expired on 31 May 1985.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Bridgeville, Pennsylvania office copies of the attached notice marked "Appendix."[65] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

---

[65]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO, if willing, in conspicuous places where notices to employees and members are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington. D.C. 20 February 1987

. . . . . .
Donald L. Dotson, Chairman

. . . . . .
Wilford W. Johansen, Member

. . . . . .
Marshall B. Babson, Member

NATIONAL LABOR RELATIONS
(SEAL) BOARD

MEMBER STEPHENS, concurring.

In *R. J. Smith,* 191 NLRB 693 (1971), enf. denied sub nom. *Engineers Local 150 v. NLRB,* 480 F.2d 1186 (D.C. Cir. 1973), the Board held that a signatory employer could unilaterally repudiate a prehire agreement without violating Section 8(a)(5) because such contracts lacked the "mature" status of a collective-bargaining agreement with a 9(a) representative. In the companion case of *Ruttmann Construction,* 191 NLRB 701 (1971), the Board offered the union a way out of this dilemma. The Board suggested that it would look to evidence that a relationship initiated under a prehire agreement has in the course of time "matured" so as to render a unilteral repudiation a breach of Section 8(a)(5). Today's decision well demonstrates that under the regime of these cases, the Board has engaged in a litigious exercise that often can be described as fanciful. My only reservation is over the manner in which the majority musters the legislative history of Section 8(f) to support the result here. One could gather that we view that history as establishing Congress' intent that prehire agreements are not only lawful under Section 8(f) but enforceable under Section 8(a)(5).[1] My survey of the deliberations convinces me that congressional intent is not so clear. There is evidence that Congress avoided making an emphatic declaration that prehire agreements created bargaining obligations under Section 8(a)(5). On the other hand, there are strong indications the Congress perceived, based on submissions it received as to construction industry practices, that such agreements were the routine basis for establishing bargaining relationships in that industry, that the parties could be expected to abide by it, and that

[1]See pp. 18-19 of the opinion for the majority.

such agreements generally produced a work force majority supportive of the union.

Thus, while Congress did not directly confront the question of Section 8(a)(5)'s relevance to prehire agreements, it does not follow that the Board itself is without warrant to interpret Section 8(a)(5) in such a manner to render unlawful a unilateral repudiation of such agreement. To paraphrase the Court's observation in *NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply)*, 353 U.S. 87 (1957), congressional inaction cannot be said to indicate an intention to leave the resolution of the enforceability problem to future legislation. Id. at 95-96.

As the Court further stated:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

Id. at 96 (footnote omitted). See also *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 844-845 (1984) (deferring to an agency's "reasonable policy choice" on a matter as to which Congress had no specific intent). As explained more fully below, the problem of enforcing prehire agreements involves essentially a balancing of competing interests. Taking into account Congress' perceptions about the construction industry as well as certain assumptions which must have undergirded Section 8(f), the Board today acts well within its statutory mandate.

In addition, I believe it is wise to address an aspect of the reasoning in *R. J. Smith* which I would characterize as

the remedial symmetry argument. Because nothing in the majority's opinion is inconsistent with my analysis of this latter point, I join all sections of the majority opinion except for the section on the legislative history of Section 8(f).

As a preliminary manner, I agree with my colleagues that we must proceed cautiously in this matter because we are overturning in part a reading of the statute that we not only have previously embraced but have defended before the Supreme Court of the United States. *NLRB v. Iron Workers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978). As my colleagues have noted, however, to the extent that we are abandoning a construction of Section 8(f) advanced in *Higdon*, we are abandoning only a construction that the Court deemed "acceptable" but "perhaps not the only tenable one." Hence, the Supreme Court has not held that Congress has foreclosed the reading of the statute that we adopt today. As explained in the majority opinion, we have been moved to consider that earlier "tenable" construction because experience has shown that it causes undue difficulties in the enforcement of the Act.

In analyzing the legislative history of Section 8(f), I think it is helpful to canvas all of the congressional deliberations on construction industry problems under the Act that preceded Section 8(f)'s enactment. Those deliberations spanned sessions from the 82d Congress, in which precursor legislation was first introduced, to the 86th Congress, in which Section 8(f) was finally enacted.[2] Briefly

---

[2]Although reports, debates, and testimony from the Congress that actually enacted a statute obviously carry the most weight, it is entirely permissible, when Congress has taken its time in considering and resolving a given problem, to examine all of the sessions of Congress in which the matter was considered prior to the final enactment of an

(Continued on next page)

put, I believe that the entire history indicates that some hearing witnesses initially raised the question whether, absent a demonstration of majority union support among its employees, a construction industry employer would have obligations, enforceable under Section 8(a)(5), to abide by the terms of a prehire agreement into which it had voluntarily entered; but there is no evidence that Congress ever directly confronted and consciously resolved that issue. I agree with my colleagues, however, that certain implicit congressional assumptions concerning the nature of the prehire agreements it was legalizing through the enactment of Section 8(f) provide sufficient support for the construction of Section 8(a)(5) and Section 8(b)(3) that we adopt in this opinion.

The problems that Section 8(f) addressed emerged shortly after the Board began applying Taft-Hartley to the construction industry in 1948. Those problems are set out in the majority opinion, and I shall not describe them all again here. The essential point is that the problems principally arose from the application of prohibitions in Section 8(a)(2) and (3) which made unlawful the *execution* of collective-bargaining agreements between unions and construction industry employers. No one complained about problems in enforcing such agreements or otherwise inducing parties to live up to their bargains. Thus, insofar as the contours of congressional intent may be defined simply by

---

(Continued)
attempted legislative solution. See, for example, *Stafford v. Briggs*, 444 U.S. 527, 536-540 (1980) (examining the legislative history of a "precursor" bill considered in the 86th Congress in order to determine congressional intent in a statute passed by the 87th Congress); *United States v. Rutherford*, 442 U.S. 544, 552 (1979) (examining views expressed in sessions of Congress Preceding the one that enacted the 1938 Food, Drug, and Cosmetic Act).

the problems Congress set out to solve, Congress did not speak to problems of enforceability and repudiation.

Congressional consideration of the problems began with the 82d Congress in 1951, when hearings were held on a bill that proposed adding language to the effect that construction industry prehire agreements would not be unfair labor practices under Section 8 of the Act. *To Amend the National Labor Relations Act, 1947, With Respect to the Building and Construction Industry: Hearing on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare,* 82d Cong., 1st Sess. 2 (1951) (*1951 Hearings*). That language, which was to be added as a proviso to Section 9(a) of the Act, drew conflicting interpretations from witnesses as to its effect on the need for a majority showing in cases involving allegations of violations of Section 8(a)(5). James J. Reynolds, Jr., then Acting Chairman of the Board, had noted that, since the bill required no election before the execution of a collective-bargaining agreement, neither a labor organization nor an employer would necessarily be relieved of the need to establish majority status under either Section 8(a)(5) or or Section 8(b)(3). *1951 Hearings* at 69. Richard J. Gray, president of the Building and Construction Trade Department of the American Federation of Labor, however, did not agree that representation elections would need to be held in connection with those sections; and he thought it unnecessary and undesirable to add particular language to those sections to make that point. (Id. at 53.) Later in the hearings, the Board's General Counsel, George Bott, read the bill as creating something akin to a "presumption of majority" in groups of employees covered by construction industry agreements (id. at 202); and he observed that this was a

presumption grounded in reality in "highly organized areas" (id. at 206). He even speculated that the bill might be read as allowing a union to file an 8(a)(5) charge against an employer who *refused* to sign a contract or otherwise recognize the union or as allowing an employer to file an 8(b)(3) charge against a union that refused to bargain with the employer about wages. (Id. at 207-208.) Senator Humphrey, who chaired the Labor Subcommittee, finally acknowledged that the bill did not make clear its consequences for refusal-to-bargain charges and that more has to be done "in terms of cross-reference of the provisions affected by this bill." (Id. at 208-209.)

In fact, in none of the deliberations following the initial 1951 hearings did Congress ever again directly address, or even have expressly raised to it, the questions mentioned by Senator Humphrey. However, there are several pieces of evidence indicating that Congress must have assumed that the collective-bargaining agreements permitted by its reform legislation would be something more than contracts that either party could freely renege on immediately following their execution.

First, in testifying before the Senate Labor Committee in 1954, in support of S. 2650, an Eisenhower Administration bill that included a precursor of Section 8(f) in at least one important respect,[3] Secretary of Labor James P. Mitchell explained:

---

[3]S. 2650, 83d Cong., 2d Sess. Sec. (e), 100 Cong. Rec. 91, 94 (1954). Congress was entertaining new proposals because legislation considered in the 82d Congress had passed the Senate but failed to pass the House. 98 Cong. Rec. 5028, 5137 (1952); Aaron *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 Indus. & Lab. Rel. Rev. 327, 333 (1958).

Unlike Sec. 8(f) as finally enacted, the prehire provision of S. 2650 (which would have become Sec. 8(e) of the Act) covered other industries

(Continued on next page)

> [The proposal] will have the desirable effect of enabling labor relations in these industries to come into conformity with the Act. Employer and unions in such industries are now subject to the penalties of the Act; they should be placed in a position *to avail themselves of the Act's benefits as well.*

Hearings on Taft-Hartley Act Revisions Before the Senate Comm. on Labor and Public Welfare, 83d Cong., 2d Sess. 2974 (1953) (emphasis added) (*1953 Hearings*). Thus, that proposal, which President Eisenhower's message had described as one under which a union would be "treated initially as the employees' representative for collective bargaining,"[4] was presented as one that would do something

---

(Continued)

with casual and intermittent employment as well as the construction industry. It also contained references to the then existing non-Communist affidavit provisions in Secs. 9(f), (g), and (h) of the Act, and lacked the hiring hall provisions later included as Sec. 8(f)(3) and (4); and it included three, rather than two provisos, the second of which does not appear in Sec. 8(f) as enacted. The three provisos read as follows: "*Provided* That nothing herein shall set aside the final proviso to Section 8(a)(3) of the Act; *Provided further,* That agreements made pursuant to this subsection shall in all other respects be subject to the provisions of section 9 of this Act: *Provided further,* That agreements made pursuant to this subsection shall not constitute a bar to petitions filed pursuant to section 9(c) or 9(e)."

There is no explanation in the Report on this bill what was intended by that second proviso. See S. Rep. No. 1211, 83d Cong., 2d Sess. 3, 14-15 (1954).

[4]S. Rep. No. 1211, 83d Cong., 2d Sess. 6 (1954). This bill died in the 83d Congress by virtue of a vote to recommit it to the Committee. 100 Cong.Rec. 6202 (1954).

In 1959, when Sec. 8(f) was finally enacted, the Eisenhower Administration was supporting a different bill. Introduced as a provision of H.R. 8400 in the House, where it was sponsored by Rep. Landrum and others (H.R. 8400, 86th Cong., 1st Sess., 1 Leg. Hist. 619, 678-679) and as S. 748 in the Senate, where it was sponsored by Senator Goldwater and others (S. 748, 86th Cong., 1st Sess., 1 Leg. Hist. 84, 147-148), this

(Continued on next page)

more than merely remove the Act's legal sanctions against entering into prehire agreements.

Second, certain remarks by Professor Archibald Cox, who served as a consultant to the Senate Committee, and who presented these same views to both the 83d and the 86th Congresses, described existing practices in the construction industry as including contracts to which parties were bound. *Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the.Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 136-137 (1959) (*1959 Hearings*); *1953 Hearings* at 3394-3395. Specifically, in comments, which in 1959 concerned Section 603 of the Kennedy-Ervin bill (S. 505), introduced in the 86th Congress[5] Professor Cox noted that construction

---

(Continued)

proposal essentially authorized special construction industry agreements only following Board certification of the union as the representative of an appropriate unit of the employer's employees. (In certain circumstances a history of collective bargaining between the union and the employer could serve as a basis for such a certification, however.) An effort by Senator Dirksen to add this provision to S. 1555 (the bill that was finally enacted) was defeated. 2 Leg. Hist. 1071-1072. Although Rep. Landrum succeeded in getting the text of H.R. 8400, as amended, substituted into the bill that was passed by the House (2 Leg. Hist. 1645, 1691-1692), the construction industry provision of this bill was ultimately rejected by the House-Senate Conference Committee in favor of the Senate's provision. Senator Kennedy, explaining the actions of the Conference Committee, stated that the Landrum-Griffin provision was rejected.as "restrictive and unworkable." 2 Leg. Hist. 1432.

[5]With the exception of one matter not here relevant, Section 603 of this bill was identical to Section 8(f) as enacted. 1 Leg. Hist. 76-78. Section 603 was later reported out of committee as a provision of S. 1555, and it was enacted by the Senate as Section 702 of that bill. 1 Leg. Hist. 579-580. It was finally enacted by both houses, following a conference, as Sec. 705 of the 1959 Act. 1 Leg. Hist. 27.

Professor Cox's statement in the 83d Congress was framed as comments on S. 2650.

industry employers customarily entered into collective-bargaining agreements prior to recruiting their workers and that local contractors "who sign such agreements are bound by their terms." *1959 Hearings* at 136. These and other enumerated collective-bargaining practices had been "uniformly approved by Government agencies other than the NLRB," he observed, but the Board had begun disrupting those practices once it began asserting jurisdiction over the industry and applying provisions of the pre-1959 Act. (*Id.* at 137.) Like NLRB General Counsel Botts in the 1951 hearings, Professor Cox assumed that as a practical matter in most cases, a majority of the workers referred under an agreement would be union members,[6] but he pointed to the protection of the final proviso of Section 603 as giving workers a means of eliminating representation by a union they did not support through the device of petitioning for an election. Generally his comments implied that the current prehire contractual practices of the industry were to be preserved, with the exception that agreements would be rendered invalid if a petitioned-for election resulted in voting out the union. Nothing in his comments or in the Senate Committee Report that in many respects echoed his comments, suggested that the Board would not be free to use the sanctions of Section 8(a)(5) to ensure that those who signed such agreements would remain "bound" by them if the collective-bargaining representative had not been repudiated by the employees in a Board election.

Third, as my colleagues correctly note, the inclusion in Section 8(f) of the proviso to which Professor Cox referred

---

[6] *1959 Hearings* at 137. As the majority opinion points out (p. 20 supra), this assumption was shared by the Senate Committee and included in its Reports on S. 1555.

also constitutes evidence of a congressional assumption that Section 8(f) might reasonably be read as authorizing the making of agreements that, except as stated otherwise, would operate like collective-bargaining agreements generally. For that second proviso is necessary only if, in its absence, the Board could reasonably have been expected to apply its contract-bar doctrine. Under that long-established doctrine, the Board ordinarily declines to entertain petitions for elections in a unit of employees covered by a current collective-bargaining agreement of reasonable duration except after the agreement's expiration and during a specified period prior to termination.[7] By providing that 8(f) agreements would not bar elections under Section 9(c) and (e), Congress precisely defined one respect in which the Board would be *required* to treat such agreements differently from 9(a) agreements.[8] By not expressly providing that—unlike 9(a) agreements—such agreements could be repudiated free of the prohibitions of Section 8(a)(5) and Section 8(b)(3), Congress, at the least, left it open to the Board to apply those sections to unilateral repudiations of 8(f) agreements if doing so can be shown to

---

[7]The doctrine was first applied in *National Sugar Refining Co.*, 10 NLRB 1410, 1415 (1939). See also *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958) (time for filing petitions); and General Cable Corp., 139 NLRB 1123 (1962) (defining reasonable duration).

[8]It must be acknowledged, however, that on the eve of Section 8(f)'s enactment, in *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958), the Board had adopted a rule that it would not allow a contract to bar an election "if executed (1) before any employees had been hired or (2) prior to a substantial increase in personnel." Since, however, contract-bar rules are not enacted by statute but are entirely of the Board's devising, Congress could have foreseen, as a possibility, either the Board's overruling of *General Extrusion* or its limitation of that doctrine to nonconstruction-industry cases. Hence, it cannot be said that the proviso was without real effect.

Construction industry prehire agreements are, by definition, agreements that can be made without regard to the requirements of Section 9(a), so it would appear, at least on the surface, that the lack of a "majority" showing at some point is fatal to our analysis. But, as the following survey of caselaw shows, majorities are sometimes presumed rather than shown, where other identifiable statutory policies make this a desirable way to proceed. And in my view, as subsequently explained, such a presumption is not unreasonable for the limited purpose of mandating the adherence of the parties to a voluntarily negotiated prehire agreement in the absence of a demonstration, through a Board election, that the union in fact lacks a majority.

In an ideal world, union representation would at all times—every hour of every day—be based on the support of a majority of those represented. At the same time, in such an ideal world, contractual conditions of employment would be stable and thus not continually subject to renegotiation or other forms of disruption. Further, in such a world, when a majority of employees in fact supported a union, the employer would be required to recognize their choice immediately and give them the benefits of representation without delay. Achieving all of these desiderata simultaneously is impossible, so accommodations must be made, and sometimes this is done in part by means of presumptions.

Thus, for example, even though a union may win a Board election, it may conceivably lose majority support soon thereafter. Notwithstanding this possibility, the Board, absent unusual circumstances, postulates an irrebuttable presumption that a majority demonstrated in a Board election continues for a year following the certification, and therefore requires the employer to bargain in

good faith with the union during that period on pain of being found in violation of Section 8(a)(5). *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). It does this in the interest of fostering "industrial stability." Id. at 103.[10] It is also entirely conceivable that a union that enjoys majority support (whether demonstrated through a Board election or otherwise) when it negotiates an agreement may lose that support thereafter. Notwithstanding this possibility, the Board has, in the interests of fostering stability of bargaining relations, developed the contract-bar doctrine which, as explained above, precludes the testing of employee sentiment during most of the term of a contract of reasonable duration.[11] More importantly, even employees' *initial*

---

[10]A rebuttable presumption of majority exists thereafter, and unless rebutted by a showing of at least objective considerations for concluding that the union has lost its majority, that presumption precludes both the employer's withdrawal of recognition and the Board's acceptance of an employer-filed election petition under Sec. 9(c)(1). *United States Gypsum Co.*, 157 NLRB 652, 655 (1966).

[11]As Board Member Rodgers explained, in an article discussing a refinement of the contract-bar doctrine:

> To allow mere repudiation [of a union] representative by the unit employees to remove a contract as a bar would certainly open the door to chaos. It is, after all, one of the inescapable facts of collective bargaining that employees are not always satisfied with the bargain that their representative has made for them. And time alone may sour the sweetest deal. Moreover, it sometimes happens that there lurks around the corner a candidate who will promise to bring home a bigger piece of bacon. Clearly, neither of these situations should be permitted to trigger a new election of representatives in the face of a valid contract, if stability of bargaining relations is to have any meaning.

Rodgers, *A Result: Union Division*, 45 Va. L. Rev. 207, 208-209 (1959).

manifestation of majority support for a bargaining representative may, in some circumstances, be simply presumed. Thus, although, in the first case in which the contract bar doctrine was applied, the Board observed that "the contract was made at a time when [the Union] represented a majority of employes in the appropriate unit" (*National Sugar Refining Co.*, 10 NLRB 1410, 1415 (1939)), the Board later developed the rule that, in representation proceedings in which a contract-bar issue was raised, it would not permit litigation of the question whether the union had possessed an untainted majority at the time the contract was executed but would simply assume that the contract was lawful in that respect. E.g., *Wilmington Terminal Warehouse Co.*, 68 NLRB 299, 302 (1946); *Comwel Co.*, 88 NLRB 810, 811 (1950).

That policy, of course, does not preclude an attack on an agreement through the timely filing of an 8(a)(2) charge, alleging, for example, that the union had lacked a majority or had been unlawfully assisted in attaining the majority it enjoyed at the time of contract execution. But that same *presumption* of lawful majority employed in the contract-bar cases is also recognized in certain unfair labor practice proceedings testing the lawfulness of an employer's withdrawal of recognition from a union with which it has originally made an agreement based on voluntary recognition. Thus, in the absence of a timely filed 8(a)(2) charge, the Board will treat that original agreement as establishing a presumption of union majority, because "it would be improper to presume that" an employer would violate the Act by entering into an agreement "if the Union did not have majority status at the time of the execution of the contract. "*Shamrock Dairy*, 119 NLRB 998, 1002 (1957), modified 124 NLRB 494 (1959), enfd. 280 F.2d 665 (D.C.

Cir.), cert. denied 364 U.S. 892 (1960). See also *R. J. Smith Construction Co.*, supra, 191 NLRB at 694-695. Further, in a proper case the Board will entertain a dual presumption—it is presumed that the union originally lawfully obtained a majority and it further presumed, in the absence of objective considerations indicating that a majority of the employees no longer wishes to have the union as their representative, that the original majority support continues. *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962, 963 (1970), enf. denied on other grounds sub nom. *NLRB v. Tragniew, Inc.*, 470 F.2d 669 (9th Cir. 1972) (accepting the dual presumption, but finding the presumption of continuing majority rebutted).

Just as the foregoing examples demonstrate that, in the interests of stability of bargaining relations, employee choice *against* union representation may be subordinated or at least put at risk for limited periods, so the Board's ruling in *Linden Lumber Div., Summer & Co.*, 190 NLRB 718 (1971), enf. denied, 487 F.2d 1099 (D.C. Cir. 1973), revd, 419 U.S. 301 (1974), illustrates how, in some circumstances, the risk of frustrating, to a limited extent, employee choice in *favor* of union representation is acceptable. There the Board held that even when an employer has had evidence presented to him, in the form of union authorization cards, that a majority of his employees want him to recognize a particular union as their designated collective-bargaining representative, the employer may simply decline to recognize the union and await the results of a Board election if the union should choose to file a petition. Under that holding, there may well be a temporary sacrifice of the goal of effectuating employee free choice—the choice of a majority of employees who desire union representation. Under a contrary holding, however,

given that authorization cards, although a permissible basis for recognition, are not as reliable an indicator of employee sentiment as a Board election, there would be at least a risk of imposing union representation in the absence of actually majority support. Since in the kind of case in question, there have been no collective-bargaining relations between the parties, at least in the immediate past, there is no compensating gain in the form of preserving the stability of bargaining relations that would warrant requiring immediate recognition. Hence the interest of discerning employee choice with the greatest degree of certainty thus carries the day. As the Supreme Court observed in approving the Board's rule: "In terms of getting on with the problems of *inaugurating regimes of industrial peace*, the policy of encouraging secret elections under the Act is favored." 419 U.S. at 307 (emphasis added). Thus, even though it could be said that a majority of the employees had "designated" the union as their representative, the Board and the Court declined to apply Section 8(a)(5) in a literal, mechanistic manner so as to find a violation in the employer's refusal to bargain with the representative.[12]

I deduce from all of the foregoing that the majority requirement incorporated by reference in Section 8(a)(5) is a malleable element—one that varies according to the nature of the issue presented and one that can sometimes be satisfied by a properly tailored presumption. In my view

---

[12]The rejection of such literal and single-minded constructions of the Act was also exemplified by the *Linden Lumber* Court's reaffirmation of the holding of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), that when an employer's unfair labor practices make the holding of a fair election impossible, the employer may be required to recognize a union that had obtained a majority before the employer had committed all his unfair labor practices even when the union has indisputably lost its majority prior to entry of the Board's bargaining order. 419 U.S. at 303-304.

our holding in this opinion is consistent with what appeared to be Congress' presumption that in most cases unions would enjoy the support of majority of the employees covered by the contracts they negotiate with construction industry employers, but we are limiting the effect of that presumption in accordance with express and implicit statutory objectives. We entertain election petitions as mandated by the second proviso in order to protect employee free choice; but we apply Section 8(a)(5) and Section 8(b)(3) to prohibit simple repudiation of an agreement by a party, since that construction of the Act helps achieve the congressional objective of assuring stable working conditions for reasonable periods of time. However, because of the general pattern of shifting work forces in the construction industry, we do *not* rely on any majority presumption beyond the date of contract expiration. Such a presumption would require the employer to recognize the union for the purpose of negotiating a new agreement; and this requirement would infringe on the congressional intent that entering into prehire agreements be entirely voluntary.[13]

Finally, for the reasons set out by my colleagues in the opinion for the majority, we abandon the "conversion" doctrine as essentially unworkable and not mandated by statute.

To be sure, current conditions in the construction industry may not be what they were when Congress was advised that in most instances employees working under

---

[13]References in the legislative history to the "voluntary" character of prehire agreements focused on the making or signing of such agreements, not the act of living up to one's contractual promises. See, e.g., 2 Leg. Hist. 1715 colloquy of 1147, 86th Cong., 1st Sess. 42, 1 Leg. Hist. 946.

prehire agreements would be likely to support the Union.[14] There may very well be many more instances in which the work force majority assembled after a prehire agreement is executed does not support a union. But the diminishment of unionization in the construction industry does not in and of itself justify allowing an employer to test majority support in an 8(a)(5) proceeding. As my colleagues have shown, that avenue is fraught with shortcomings. Our decision preserves and vitalizes the alternative mechanism—an election, guaranteed by the 8(f) proviso—for determining more accurately employee sentiment. As long as Congress is willing to preserve prehire agreements, despite changes in the construction industry, we should not be foreclosed from ordering their enforcement.

---

[14]Thus, at the oral argument in this case, counsel for the Council on Labor Law Equality painted a different picture from the one portrayed to Congress more than three decades ago (Tr. of oral argument at 54-55):

> [A] typical case is one where an employer is usually a non-union open shop employer. He's on a mixed construction site. A business agent comes up to him and says, "you've got to be union." (He's done a card check on the employees and the employees are not union.) [He says] "you've got to sign this agreement." He hands him the short form agreement.
>
> The business agent invariably tells him this is just for this project. "And all I want is a couple of your men." The men know nothing about what's going on. The employer, in order to work, signs. . . .

This description is in accord with testimony by some construction industry employer representatives before recent congressional committee hearings in which legislation to overturn *R. J. Smith* was considered. *Hearing on H.R. 281 Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor*, Serial No. 99-29, 99th Cohg., 1st Sess. 43, 44-45 (1985) (statement of Charles E. Murphy on behalf of the Associated General Contractors); *Hearing on Developments in Labor Law Affecting the Construction Industry Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor*, 98th Cong., 1st Sess. 32, 33 (1983).

Dated, Washington, D.C. 20 February 1987

.....

James M. Stephens, Member

NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, during the term of a collective-bargaining agreement, repudiate that agreement and withdraw recognition from International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO, as the exclusive collective-bargaining representative of our employees covered by the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have suffered as a result of our failure to adhere to the 1982-1985 contract with the Union until it expired on 31 May 1985.

JOHN DEKLEWA, THEODORE DEKLEWA
AND ROBERT DEKLEWA, d/b/a
JOHN DEKLEWA & SONS AND/OR
JOHN DEKLEWA & SONS, INC.

(Employer)

Dated ..... By .....
(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William S. Moorhead Federal Building, Room 1501, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-722-2969.